No. 6600

United States

Circuit Court of Appeals

For the Ninth Circuit.

2d

PUGET SOUND NAVIGATION COMPANY, a Corporation,

Appellant,

vs.

HANS NELSON,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

Messrs. BRONSON, JONES & BRONSON, Attorneys for Appellant,
614 Colman Building, Seattle, Washington.

Mr. WINTER S. MARTIN and Mr. ARTHUR COLLETT, Jr., Attorneys for Appellee,
2014 Smith Tower, Seattle, Washington.

In the Superior Court of the State of Washington for King County.

No. 20,246.

No. 219,944.

HANS NELSON,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a Corporation,

Defendant.

COMPLAINT.

Plaintiff for cause of action against defendant complains and alleges:

I.

That defendant is a Nevada corporation which [1*] now is and during all times herein mentioned was doing business within this State with its office

*Page-number appearing at the foot of page of original certified Transcript of Record.

and principal place of business at Seattle in the county of King. That it maintains an office for the transaction of business at said Seattle and was engaged in the transaction of business in and maintained an office for that purpose in said King County at the time the cause of action herein pleaded arose.

II.

That the gas screw "Magna" was an undocumented vessel of the United States, which on and prior to December 5th, 1927, was and had been numbered "M–1157" by the Collector of Customs at Seattle, Washington, pursuant to the Act of June 17th, 1918, which said number had been duly recorded by the said collector. That said "Magna" was about 34 feet over-all, 4 tons burden, equipped with one mast and trunk cabin, and was at the time of the collision hereinafter complained of fully equipped as a trolling vessel. That plaintiff herein on said 5th day of December, 1927, was, and for a long time prior thereto had been the sole owner of all of said vessel.

III.

That the steam ferry "Olympic" hereinafter referred to is a merchant vessel of the United States which at the time of the collision hereinafter referred to was owned, controlled and operated by the [2] defendant as a ferry on the run between Seattle and Port Townsend, Washington.

IV.

That on said 5th day of December, 1927, at about five o'clock in the afternoon of said day, the said

"Magna," while en route from Salmon Bay in the Ballard district of Seattle, across Puget Sound, and while steering a course about west northwest, was overtaken, run down and sunk by said "Olympic," which was then and there traveling upon a northerly and overtaking course, while en route from Seattle to Port Townsend.

V.

That the said "Magna" then and there foundered and became a total loss. That the collision and loss of the "Magna" was caused solely by the gross negligence and fault of the master and officers of the said "Olympic" in this:

That at the time of the collision it was still daylight, the weather clear and there was sufficient light to see clearly a small vessel like the "Magna" at a distance of about a half mile.

That the "Magna" was making about five knots and the "Olympic" about 15 knots at the time of and immediately prior to the collision.

That the "Olympic" was pursuing an overtaking course which would place her upon the "Magna's" port beam and quarter.

1. That the master and officers of the "Olympic" were grossly negligent and at fault for not [3] then and there keeping and posting a proper and efficient lookout as required by law and the "Inland Rules."

2. That the master and officers of the "Olympic" failed to sound or give any whistle, blast or other warning due by the "Inland Rules," and

"Pilot Rules" on the part of a vessel overtaking and attempting to pass another vessel.

3. That the master and officers of the said "Olympic" then and there violated Article 24 of the "Inland Rules" in that the "Olympic" did not keep out of the way of the "Magna," the said "Olympic" then and there being an overtaking vessel.

4. That the master and officers of the "Olympic" failed to keep and post a lookout in the fore part of the ship on the main-deck, when a proper and efficient lookout would and could have seen the said "Magna" in ample time to have reported the "Magna" to those in command of the "Olympic" whereby the collision could have been avoided.

5. That the "Olympic" then and there failed to slacken her speed, stop and reverse as required by Article 23 of the "Inland Rules," when she approached and overtook the "Magna," said "Olympic" then and there being an overtaking vessel.

6. That the master and officers of the "Olympic" then and there violated Article 29 of the "Inland Rules" in that they and each of them, all and singular, failed to keep such a lookout, and failed [4] to maintain such a speed as common prudence and good navigation required when they and each of them, knew or in the exercise of due care should have known the "Olympic," being then and there off the entrance to Salmon Bay in the Ballard District where at all times of day or night small vessels which are going into or leaving Salmon Bay

may be encountered. That large numbers of vessels of the "Magna" type commonly resort to Salmon Bay for anchorage or wharfage.

VI.

That at the time and immediately prior to the time when she foundered and became a total loss, said "Magna" was of the reasonable value in the sum of $4,200.00. That there was equipment and personal property on board at said time which became a total loss of a value of $636.20, an itemized list of which is hereto attached and made a part hereof.

VII.

That the master and officers of the "Olympic" were, at and prior to the collision, in charge of the operation and navigation of said vessel for and on behalf of defendant while in its employ and while the said vessel was being used and employed in the defendant's service for defendant's profit and advantage.

That the plaintiff for a further and second cause of action alleges as follows:

I.

That plaintiff hereby incorporated by reference [5] Paragraphs I, II, III, IV, V, VI, and VII of his first cause of action herein, and makes the same a part of this second cause of action as if set out in full herein.

II.

That when the above-mentioned collision occurred the impact of the colliding vessel was such

that the "Magna" immediately filled with water and sank, and the plaintiff was thrown into the waters of Puget Sound and narrowly escaped drowning. That plaintiff went completely under water twice before he was finally rescued by the crew of the "Olympic."

III.

That the master, officers and members of the crew of said "Olympic," were incompetent and inexperienced in handling and manning the lifeboats and life-saving apparatus of said vessel. That thru the incompetency, inexperience and negligence of the master, officers and crew of said "Olympic," undue delay was caused in effecting the rescue of plaintiff from the waters of Puget Sound. That approximately one-half hour was consumed in said rescue. That during his struggle in the water, before being finally rescued, plaintiff was forced to swallow a large quantity of salt water which resulted in gastritis, causing plaintiff great pain and suffering, and which still causes him a great pain and suffering which will continue for a long time in the future as he verily believes.

That when said collision occurred, plaintiff was [6] thrown violently against the engine of his vessel. That as a result thereof, his right leg was cut, bruised and made sore and lame. That it was still sore and lame. That said cut, bruised and lame condition of his said leg caused plaintiff great pain and suffering and will continue to cause him great pain and suffering in the future as he verily believes.

WHEREFORE, plaintiff demands judgment against the defendant as follows, viz.:

1. For his FIRST CAUSE OF ACTION herein in the sum of $4,836.20.

2. For his SECOND CAUSE OF ACTION herein, in the sum of $2,500.00.

3. For his fees, costs and disbursements herein, and for such other and further relief as to the Court may seem just and equitable in the premises.

WINTER S. MARTIN,
ARTHUR COLLETT, Jr.,
Attorneys for Plaintiff.

LIST OF PLAINTIFF'S PERSONAL PROPERTY ON BOARD "MAGNA."

200 gals. gasoline at 18¢	*$30.00*
8 gals. lubricating oil at 90¢	7.20
Weather glass	13.00
Compass	15.00
Charts	30.00
Binoculars	15.00
Automobile tools	15.00
Cooking utensils, dishes, etc.	30.00

[7]

500 lbs. lead at 17¢	85.00
5½ doz. spoons at $9.00	49.50
1 doz. hooks	5.00
Lines (fish)	25.00
1 dress suit	60.00
1 overcoat	35.00
1 pr. shoes	8.00
1 dress shirt	2.00

1 cap	3.00
2 blankets	10.00
1 suit oil clothes	5.00
1 pr. rubber boots	7.50
Money (Cash)	125.00
Gun	20.00
Watch	35.00
Total	$636.20.

State of Washington,
County of King,—ss.

Winter S. Martin, being first duly sworn, upon his oath deposes and says: That he is attorney for the plaintiff in the above cause and makes this verification for and upon his behalf for the reason that Hans Nelson, plaintiff in the above-entitled cause, is not now within King County, Washington, that is to say, said Nelson is in the territory of Alaska. That affiant has read the foregoing complaint, knows the contents thereof and the same is true as he verily believes.

WINTER S. MARTIN. [8]

Subscribed and sworn to before me this 14th day of May, 1929.

KENNETH DURHAM,
Notary Public in and for the State of Washington,
Residing at Seattle.

Filed in County Clerk's Office King County, Wash., May 15, 1929. Abe N. Olson, Clerk. By A. L. Lawrence, Deputy.

[Endorsed]: Filed Jul. 1929. Ed. M. Lakin, Clerk. By S. Cook, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 20,246.

HANS NELSON,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a Corporation,

Defendant.

ANSWER.

Comes now the defendant, Puget Sound Navigation Company, a corporation, and without waiving its demurrer herein to the amended complaint of plaintiff, but still insisting upon the same, in answer to said amended complaint admits, denies and alleges as follows: [9]

I.

Answering paragraph I, defendant admits the same.

II.

Answering paragraph II, defendant has not sufficient knowledge or information to form a belief as to the truth or falsity thereof, and therefore denies the same, and each and every allegation, matter and thing in said paragraph contained.

III.

Answering paragraph III, defendant admits the same.

IV.

Answering paragraph IV, defendant admits that on the 5th day of December, 1927, at a point adjacent to West Point, Puget Sound, the steamship "Olympic" came into collision with the gas screw "Magna," and, except as herein expressly admitted, defendant denies each and every allegation, matter and thing in said paragraph contained.

V.

Answering paragraph V, defendant admits that within one hour after said collision, said gas screw "Magna" foundered and became a total loss.

Further answering said paragraph, defendant denies that the said collision and the loss of said "Magna" was caused, or contributed to in any manner, respect or circumstance, by any negligence and/or fault of the master and/or officers of the said "Olympic," and further denies that at the [10] time of said collision, it was still daylight and/or that the weather was clear, and/or that there was sufficient light to see clearly, or at all, a small vessel like the "Magna" at a distance of a half a mile, or any other distance other than that hereinafter expressly admitted.

Further answering said paragraph, defendant denies that at the time of the collision the "Olympic" was making 15 knots per hour, but admits that prior to said collision the said vessel was making about 15 knots per hour; admits that the "Magna" was making about 5 knots per hour at the time of said collision, and admits that the "Olympic" was pursuing an overtaking course on a bearing

of approximately 2 or 3 points on the "Magna's" port quarter.

Answering subparagraphs 1, 2, 3, 4, 5 and 6 of said paragraph V, defendant denies the same, and each and every allegation, matter and thing in said subparagraphs contained.

VI.

Answering paragraph VI, defendant denies each and every allegation, matter and thing in said paragraph contained, especially denying that at the time of the loss of said "Magna" she was of the reasonable value of $4,200.00, or any other sum or amount whatsoever, or at all, defendant being without knowledge or information as to the amount or extent of the value of said vessel. Further answering said paragraph, defendant is without sufficient knowledge or information to form a belief [11] as to the amount or value of any personal property on board said vessel, if any, and therefore denies that there was on board said vessel personal property of the value of $636.20, or any other sum or amount whatsoever, or at all, which became a total loss, or a loss in any respect or amount whatsoever, or at all.

VII.

Defendant admits paragraph VII of said amended complaint.

Answering the alleged second cause of action in said amended complaint of plaintiff herein, defendant admits, denies, and alleges as follows:

I.

Answering paragraph I of said alleged second cause of action, defendant reiterates and hereby incorporates, by reference, paragraphs I, II, III, IV, V, VI and VII of its foregoing answer herein, and makes the same a part of its answer to plaintiff's alleged second cause of action as fully as though again herein set forth in words and figures in full.

II.

Answering paragraph II, defendant denies each and every allegation, matter and thing in said paragraph contained.

III.

Answering paragraph III, defendant denies each and every allegation, matter and thing in said paragraph contained, especially denying that plaintiff was or has been damaged in the further sum [12] of $2,500.00, or any other sum of amount whatsoever, or at all.

Further answering plaintiff's alleged first and second causes of action, and, by way of a first, separate and affirmative defense to each thereof, defendant alleges as follows:

I.

That at the time of the collision alleged in the complaint herein, the sky was overcast, it was dark, or nearly so, sunset having occurred on said day at 4:17 o'clock P. M., a strong northwest wind was blowing against an ebb tide, causing a rough, choppy sea, with waves cresting over; that under such conditions small boats, or floating objects, of

35 feet or under, without lights, were visible for a distance of less than 100 feet from the bow of the steamship "Olympic," which was, at 5:19 o'clock P. M. of said day, proceeding down sound on a northerly course between West Point and Point No Point, on the inland waters of Puget Sound.

II.

That at about 5:19 o'clock P. M., on said 5th day of December, 1927, the SS. "Olympic," then bound on a voyage from Seattle to Port Townsend, was proceeding on her regular course from West Point to Point No Point, and had reached a position of approximately 3 miles NNW. of West Point light, when a small boat, later identified as the gas screw "Magna," was observed close aboard directly ahead and less than 100 feet [13] distant from the SS. "Olympic," said "Magna," when so first discernible from the "Olympic," being under the bow of the latter vessel, and proceeding on a course of 2 to 3 points to the westward of that being taken by the "Olympic."

III.

That at said time and place the said gas screw "Magna" carried no light of any character showing abaft her beam and visible to those in charge of the navigation of the "Olympic"; that said "Magna" was not visible or discernible until actually seen by the officers and crew of "Olympic" at which time said vessels were in the jaws of collision, and the resultant collision, damage and loss was then inevitable, notwithstanding which all steps were taken and all things done by those having in

charge the navigation of the said "Olympic" tending to avoid said collision and to minimize and lessen the damage and loss resulting therefrom.

IV.

That at the time of and prior to the said collision all proper lights, as required by law, were carried, shown and burning brightly on said "Olympic," and the navigation of said vessel was then in charge of a full watch complement of licensed officers and crew, who were diligently and carefully attending to their duties in the navigation of said vessel in all respects; that the aforesaid collision and loss, damage and injury resulting therefrom was due solely and proximately to the gross negligence [14] and carelessness of the plaintiff herein, said gross negligence and carelessness being, viz.:

1. That said gas screw "Magna" was not rigged for, and did not carry or show a white or any other light visible abaft the beam, as required by Section (f) of Inland Pilot Rule No. 2, and subsection (b) of Section 3 of an Act of Congress, approved June 9, 1910, entitled "An Act to Amend Laws for Preventing Collision of Vessels and to Regulate Equipment of Certain Motor Boats on the Navigable Waters of the United States."

2. For some time prior to and at the time of the collision between said vessels, the plaintiff was the only *peron* on board the "Magna" and left the wheel of said vessel and had gone below deck leaving said vessel under way and proceeding at random with no lookout being kept for, and no atten-

tion paid to, the approach of proximity of other vessels, including the "Olympic," notwithstanding that plaintiff well knew that said "Magna" was then and there in waters frequented by a large number of vessels and in the mian channel path of all vessels proceeding up and down the Sound.

Further answering plaintiff's alleged second cause of action, and by way of a second, separate and affirmative defense thereto, the defendant alleges as follows:

I.

The defendant hereby reiterates and incorporates by reference paragraphs I to IV of the first affirmative defense herein, and makes the same a part of this second affirmative defense, in all respects as [15] though herein again set forth in full in words and figures.

II.

That in addition to the acts of negligence and carelessness on behalf of plaintiff, set forth in the preceding paragraphs of this answer, all loss, damage or injury, if any, which plaintiff may have suffered, as alleged in his alleged second cause of action, was further proximately caused and contributed to by the sole negligence of the plaintiff in the following respects:

1. That following the collision between said vessels, plaintiff negligently and carelessly failed and neglected to stop the engine of the said "Magna" and allowed said vessel to proceed under power from the scene of the collision and approximately at right angles to the course of the "Olympic" until the engine of said "Magna" was stopped by the

rise of water in said vessel, thereby rendering difficult, and causing delay and additional time to be expended in the maneuvering of the SS. "Olympic" to reach the spot where said "Magna" finally foundered and sank; and

2. That plaintiff negligently and carelessly, voluntarily and unnecessarily jumped overboard from said "Magna" prior to the arrival of rescue and prior to the sinking of said "Magna"; and

3. That plaintiff negligently and carelessly failed and neglected to have on board or use either life-preservers or life-belts or buoyant cushions or ring-buoys, or other device as required by Section 5 of the Act of Congress approved June 9, 1910, entitled [16] "An Act to Amend Laws for Preventing Collision of Vessels and to Regulate Equipment of Certain Motor Boats on the Navigable Waters of the United States."

WHEREFORE, having fully answered, defendant prays that plaintiff's complaint and that the alleged first and second causes of action therein may be dismissed and that defendant do have and recover of and from the plaintiff herein its costs and disbursements to be taxed.

BRONSON, JONES & BRONSON,
Attorneys for Defendant.

Office and P. O. Address:
614 Colman Bldg.,
Seattle, Washington.

United States of America,
Western District of Washington,
Northern Division.

Ira Bronson, being first duly sworn, on oath deposes and says: That he is the president of Puget Sound Navigation Company, a corporation defendant in the above-entitled action and that he makes this verification for and on behalf of said defendant; that he has read the above and foregoing answer, knows the contents thereof, and that the same is true, except as to the matters therein stated to be alleged on information and belie*ve,* and as to those matters he believes it to be true.

IRA BRONSON. [17]

Subscribed and sworn to before me this 19th day of September, 1929.

[Seal] R. E. BRONSON,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy rec'd this 20th day Sept., 1929.

W. S. MARTIN,
Atty. for Pltff.
By M. S.

[Endorsed]: Filed Sep. 20, 1929.

[Title of Court and Cause.]

REPLY.

Comes now the plaintiff, Hans Nelson, and for his

reply to the affirmative matter contained in defendant's answer herein, admits, denies and alleges as follows, to wit:

Replying to defendant's first affirmative defense contained in said answer, plaintiff admits, denies and alleges as follows, to wit:

I.

Replying to Paragraph I of said affirmative defense, plaintiff denies the same, and denies each and every allegation therein contained.

II.

Replying to Paragraph *I* of said affirmative defense, plaintiff denies the same, and denies each and every allegation therein contained. [18]

III.

Replying to Paragraph III of said affirmative defense, plaintiff denies the same, and denies each and every allegation therein contained.

IV.

Replying to Paragraph IV of said affirmative defense, plaintiff denies the same, and denies each and every allegation therein contained, except that plaintiff admits that "for some time prior to and at the time of the collision between said vessels, the plaintiff was the only person on board the "Magna."

Replying to defendants' second affirmative defense contained in said answer, plaintiff admits, denies and alleges as follows, to wit:

I.

Replying to Paragraph I of said affirmative de-

fense, the plaintiff hereby reiterates and incorporates by reference paragraphs I to IV of the reply to the first affirmative defense herein, and makes the same a part of this reply in all respects as though herein again set forth in full in words and figures.

II.

Replying to Paragraph II of said affirmative defense, the plaintiff hereby denies the same, and denies each and every allegation therein contained.

WHEREFORE, having fully replied, plaintiff prays that defendant's answer and the alleged first and second affirmative defenses therein contained may be dismissed, and that plaintiff have and recover [19] from defendant as prayed for in his complaint herein.

WINTER S. MARTIN,
ARTHUR COLLETT, Jr.,
Attorneys for Plaintiff.

United States of America,
Western District of Washington,
Northern Division.

Hans Nelson, being first duly sworn, upon his oath says: That he is the plaintiff in the above-entitled cause; that he has read the above and foregoing reply, knows the contents thereof, and that the same is true, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

HANS NELSON.

Subscribed and sworn to before me this 9th day of October, 1929.

[Seal] ARTHUR COLLETT, Jr.,
Notary Public in and for the State of Washington,
Residing at Seattle.

Service of a copy hereof admitted this 9 day of October, 1929.

BRONSON, JONES & BRONSON,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 9, 1929. [20]

[Title of Cause and Court.]

MINUTES OF COURT—MAY 5, 1931—ORDER DENYING MOTION FOR DIRECTED VERDICT.

Counsel for defendant moves for a directed verdict on the ground of insufficient evidence. The motion is denied.

[Title of Cause and Court.]

MINUTES OF COURT—MAY 6, 1931—ORDER DENYING RENEWED MOTION FOR DIRECTED VERDICT.

* * * Counsel for the defendant renews motion for a directed verdict and the same is denied. * * * [21]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled cause, find for the plaintiff, and fix the amount of his recovery in the sum of Two Thousand Two Hundred & Fifty Dollars ($2,250.00) on the first cause of action, and in the sum of Two Hundred and Fifty Dollars ($250.00) on the second cause of action.

J. HEPWORTH, (Signed)
Foreman.

[Endorsed]: Filed May 8, 1931.

Journal 19, Pg. 275. [22]

United States District Court for the Western District of Washington, Northern Division.

No. 20,245.

HANS NELSON,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a Corporation,

Defendant.

JUDGMENT.

The above-entitled cause having been tried to a jury in the above-entitled court on the 5th and 6th days of May, 1931, before Hon. George A. Bourquin, United States District Judge, and the jury having

returned a verdict for Twenty-two Hundred and Fifty Dollars ($2,250.00) on plaintiff's first cause of action, and Two Hundred and Fifty Dollars ($250.00) on plaintiff's second cause of action, now, upon motion of the plaintiff for judgment on the verdict,—

IT IS ADJUDGED AND DECREED that plaintiff have and recover Twenty-five Hundred Dollars ($2500.00), less the sum of Three Hundred Twelve and 5/100 Dollars ($312.05), costs duly awarded and entered in favor of defendant in the United States Circuit Court of Appeals and the Supreme Court of the United States, or the sum of Twenty-one Hundred Eighty-seven & 95/100 Dollars ($2187.95), together with plaintiff's costs to be taxed by the Clerk and that execution may issue for said sum of Twenty-one Hundred Eighty-seven & 95/100 Dollars ($2187.95), plus the amount of plaintiff's costs, as finally taxed herein. Defendant's exception is hereby noted and allowed.

Done in open court this 11 day of May, 1931.

GEORGE M. BOURQUIN,
United States District Judge.

At law is power to offset judgments on motion. Orally moved here and granted.

BOURQUIN, J. [23]

[Endorsed]: Filed May 11, 1931.

J. & D. 7, Pg. 36. [24]

[Title of Court and Cause.]

PROPOSED BILL OF EXCEPTIONS.

Comes now the defendant and herewith files and submits the following proposed bill of exceptions for settlement and certification.

BRONSON, JONES & BRONSON,
Attorneys for Defendant. [25]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that heretofore, to wit, on Tuesday, the 5th day of May, 1931, at the hour of ten o'clock in the forenoon, the above-entitled cause came regularly on for trial before the Honorable George M. Bourquin, and a jury duly and regularly impaneled and sworn to try the same;

The plaintiff appearing in person and by Winter S. Martin, Esq. (Martin & Collett), his attorney and counsel.

The defendant appearing by Robert E. Bronson, Esq. (Bronson, Jones & Bronson), its attorneys and counsel.

WHEREUPON the following proceedings were had and testimony given, to wit:

(Opening statements to the jury by counsel for the respective parties.)

Thereupon the following testimony was introduced on behalf of the plaintiff:

TESTIMONY OF R. G. GUERIN, FOR PLAINTIFF.

R. G. GUERIN, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination.

My name is R. G. Guerin. I am a resident of Seattle, and one of the court reporters who reported the previous trial of this case. I recall taking the testimony of a witness, Mrs. Hattie Schuman, in the former trial. She testified as [26] follows, as transcribed by me in my notes:

On direct examination by Mr. MARTIN: My name is Hattie Schuman. I live at Port Townsend, and lived there in December, 1927. My husband is here in court with me. On December 5th I went on board the steam ferry "Olympic." The boat left at 4:30. My husband was with me. We were eating lunch. It wasn't dark. That was around about five o'clock. I couldn't say. I had no timepiece. I was eating lunch when I heard a terrible bumping of the boat. For a little while we didn't pay much attention to it. My thought was that the boat had struck a log. We sat there quite a while and then saw a commotion on the boat. We all jumped up and ran to the windows. Then it was getting dark, but I still saw the boat. When I jumped up I went right to about the center of the boat and had an outlook on the sinking boat. I looked out the window and stayed near the window. They had all the windows open and

(Testimony of R. G. Guerin.)

everybody was looking out. I looked right out the window and saw the boat sinking. It as still a little light and I could see the boat. The boat was maybe 150 yards away. I saw a light on the boat. I saw the light as the boat sank out of sight. The light was still burning. I saw just one man that was drowning. He as screaming for help, telling us that he was drowning. That is all I know about it. I saw the man just at first, but it grew dark quickly. I didn't see him any more. I could just hear him calling for help. It was about fifteen minutes between the time when I felt the crash and when I went to the window and looked out. At the time I felt the bump it was just light enough outside to know that it was growing dusk, but it wasn't dark. It seemed a long time from the time I saw the man in the water until he was brought to the ship, maybe half an hour. [27]

On cross-examination by Mr. BRONSON: When I first saw him the vessel was 150 yards away, because the "Olympic" had backed, that left that boat that far away from him. I should judge about as far as a city block. I saw no illumination, only the light on the boat. I didn't see any light shining down on the boat. It was very dark when the boat sank. I lost sight of the man when the boat sank. I never lost sight of the light. The boat had sunk out of sight we could still see the light. I couldn't tell how long it was after I first saw the boat until she sank. We were greatly excited.

(Testimony of Emil F. Schuman.)

It was fully half an hour I should judge. When we were eating dinner the electric lights were on in the dining saloon. The lights were all on in the cabin.

TESTIMONY OF EMIL F. SCHUMAN, FOR PLAINTIFF.

EMIL F. SCHUMAN, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination.

My name is Emil F. Schuman. I have lived at Port Townsend since 1914. I was a passenger on the steamer "Olympic" on December 5, 1927. Mrs. Schuman, my wife, was with me. She is not living now. She passed away July 12th of last year. She is the lady whose testimony was just given by the court reporter. I left Seattle at 4:30 P. M. on the "Olympic." There was later a collision between the "Olympic" and a fishing vessel. We started out on schedule time as usual and when we got down there where the spar buoy is, down there by the West Point lighthouse, we sat down to eat with some ladies, and they had lunch, and it was not more than a few minutes longer when we struck something I thought. My wife ate lunch at the lunch-counter aft on the main deck. I was eating down about amidship on the main deck [28] in the passenger's room. As soon as we struck I didn't know what had happened. I rushed over to the window and I could not see anything,

(Testimony of Emil F. Schuman.)

so I rushed right upstairs because there is no veranda around the "Olympic," and I saw that we had struck a boat. I was then on the upper deck.

(At this point, three photographs were offered and admitted in evidence as Plaintiff's Exhibits 1, 2 and 3.)

(Upon examining the photographs the witness stated that he took a position behind the first life-boat shown on Exhibit 2, on the port side.)

It did not take me over a minute to get to that point after I felt the bump. At that time it was getting dusk. It was then perhaps close to five o'clock. An object of any size I could see quite aways, say a thousand feet. At that time I would not have needed any artificial light to have seen an object 1,000 feet away on the water. It was quite a ways past the fishing boat. When I got up there I noticed the starboard light and the white light in front. The starboard light was green. At that time the "Olympic" backed up and it was getting quite dark fast, and I could see the man on board that boat. We backed up far enough and I could see where the port side of this fishing boat was stove in as far as the water-line. I could see a big hole there. I could see the crushed outside boards. That was in the stern. I should say the "Olympic" passed the "Magna" a couple of blocks before she stopped. Then the "Olympic" backed up and tried to rescue the man. I cannot say whether she went directly astern or made a circle and turned and came back. The "Magna"

(Testimony of Emil F. Schuman.)

was astern of us. We later backed up a little beyond the "Magna."

Thereupon the following proceedings were had:

Q. Now, as you passed the "Magna," after you stopped, or as you backed up, did you observe any other light? [29] A. I did.

Mr. BRONSON.—Just a minute. I object to that as immaterial, your Honor.

The COURT.—Overruled.

The WITNESS.—I did.

Mr. BRONSON.—Exception.

Q. What lights, if any, did you see?

A. I saw a white light —

Mr. BRONSON.—(Interrupting.) Just a minute. I object again, your Honor. May I state the grounds of my objection, please?

The COURT.—Surely.

Mr. BRONSON.—This witness is not testifying to any time prior to this collision. He is testifying to what he saw after he came on deck, after the collision, and what lights might appear on the vessels before they had passed each other and swung out into different positions is a matter of speculation.

The COURT.—That is no speculation at all.

Mr. BRONSON.—Well, it is a speculation, your Honor, as to what lights were showing before this accident.

The COURT.—That might be open to question, of course, but this was so near after the event that it is at least permissible to go to the jury, and

(Testimony of Emil F. Schuman.)

the jury will understand the whole situation. Objection overruled.

Mr. BRONSON.—We ask for an exception.

The COURT.—Exception allowed.

Thereupon the witness continued his testimony as follows: I saw a white light. Do you want me to state where I saw that light. It was a white light in the center of the door [30] where you go down into the engine-room or cabin, whatever it may be, and I do not know whether there was another light in the cabin or not, and the cabin was quite lit up and I could see Mr.—what is his name, the skipper. The door was open. The light was hanging right in the center where you step down into the engine-room. At that time I could see the stern of the vessel and deck of the vessel aft of the light. That is the time when I observed when the collision occurred. Somehow or other the boat shifted around a little to the left so that she was at a four or five degree angle from the "Olympic," and I could see the crushed side. There was nothing on the stern of the boat which interfered with my vision of the light. It was a white light. It looked like an electric light. It was a little over a hundred feet, I guess, away when I saw the light. It was getting dusk then. I could not observe the light closely. The white light appeared approximately four feet above the "Magna's" main deck. I did not see more than one white light at any time when we were passing the "Magna," either the first or second time. I saw a white light and the green light on the starboard

(Testimony of Emil F. Schuman.)

at the same time, but do not remember seeing the red light. Then, after seeing those lights, I saw the light in the door.

Thereupon the following proceedings took place:

Q. Now, when you first went on deck, could you have seen the "Magna," I think you said a thousand feet away—could you have seen this vessel without any light on?

Mr. BRONSON.—I object to that as speculative and calling for a conclusion of the witness.

The COURT.—Well, it goes to a situation with respect to which it is impossible otherwise to explain to the jury how good the light was on the water. I think that he may answer. [31]

Mr. BRONSON.—Exception.

The COURT.—If he formed any judgment. The objection is overruled.

Mr. BRONSON.—Exception.

A. Yes, sir.

The COURT.—Now, again, are you fixing any distance on the vessel?

Q. Would you estimate the distance when you first went on deck—the distance away that you could see the "Magna" without any artificial light on it?

Mr. BRONSON.—Same objection, your Honor.

The COURT.—Overruled.

Mr. BRONSON.—Exception.

A. Two small city blocks.

Q. Can you estimate in feet what that would be?

A. Approximately four hundred feet.

Q. Do you mean, now, when you actually did

(Testimony of Emil F. Schuman.)

see it, or the distance you could have seen it? Mr. Collett has called my attention to that difference.

Mr. BRONSON.—Same objection.

The COURT.—Same ruling. Do you understand the question?

Mr. BRONSON.—Exception.

The WITNESS.—No, sir.

The COURT.—When you say "approximately 400 feet," is that the distance that it was when you came on deck, or is that the distance you estimate that you could have seen it without lights?

A. No, that was the distance that I could see it without any light, easy.

A. And how far do you think it was away from you when you came on deck and first saw the "Magna"? [32]

A. When I first saw the "Magna"?

Q. Yes. A. Not over a block.

Mr. MARTIN.—That is all.

Mr. BRONSON.—If the Court please, at this time I move that all the witness' testimony with reference to lights which he observed after the collision between these vessels be stricken from the record, and the jury instructed to disregard it, as wholly immaterial to any issue in this case.

The COURT.—Not necessarily. I think it is a matter that can be shown to the jury, under proper instructions later. You understand, Gentlemen of the Jury, the vital issue in this case is in respect to the light at the time of the collision. This witness is speaking about lights after the collision,

(Testimony of Emil F. Schuman.)

and the court allows it to go in, to you, but you will be controlled in your instructions as to what weight or what importance it bears on the case. The motion will be denied.

Mr. BRONSON.—Exception.

The COURT.—Yes.

Mr. BRONSON.—I also ask that the testimony of the witness with respect to how far he could have seen the light be stricken as not predicated upon any facts in this case, and also on the ground that it is speculative and remote, and pure guess-work on the part of the witness.

The COURT.—The matter of light at that time, the jury has heard the witness' statement of the conditions, and his judgment, and they will give it just as much weight as they think it is entitled to and no more. The motion is denied.

Mr. BRONSON.—Exception. [33]

The COURT.—Proceed with your cross-examination.

Cross-examination.

On cross-examination the witness further testified:

When I proceeded from the interior of the vessel, I went up the stairway of the left-hand side and I first looked over the port side and saw the "Magna" a little over one hundred feet away. Our boat was still moving. The "Magna" was heading toward Port Townsend. She was not moving that I know of. She seemed to be dead in the water. I did not see any sign of life about

(Testimony of Emil F. Schuman.)

the vessel at that time, or until we had backed up and got astern of the "Magna." I then saw Mr. Hans Nelson when the boat was sinking very fast and he shouted, "For God's sake, help me, I am drowning!" The boat was then about 150 feet away, northwest from where we were, astern of our vessel. I did not see any other objects anywhere around there. At that time it was getting quite dusk. When I said that I could have seen objects in the water. I did not see any. I did not say I did see the "Magna" a thousand feet away. The fartherest away I saw her was a couple of city blocks, something around four hundred feet. When we backed up alongside the "Magna" there was illumination inside of her cabin. I don't know how many boats the "Magna" had. I didn't look to see. She didn't have any mast that I know of. I could not observe the small mast nohow at the time that we got there, it was so dark. The shape of her house was just the same as any other fishing boat's house. Just a small cabin on her, the cabin and engine-room combined, I presume. The doorway leading down into the engine-room was right in back. It was aft of the cabin leading down into the engine-room. That is the door that I say is open when I looked down there. Something leading down into the ship. [34] That is where I saw this light. The "Magna" had a pilot-house that sat up on top of the rest of the boat. Aft the pilot-house she had a cabin and a pilot-house combined, a trunk cabin.

TESTIMONY OF OSCAR W. DAM, FOR PLAINTIFF.

OSCAR W. DAM, called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

My name is Oscar W. Dam. I am a Deputy Collector of Customs in this district. I am custodian of the records of vessels as well as the vessels merely numbered under the customs law. The M.1557 is what is called an undocumented vessel. We had assigned that customs identification number. Her tonnage is 4.73 net. It is not large enough to be documented.

(Whereupon the witness identified exhibits 4, 5 and 6 as admeasurement and certificate cards relating to the "Magna," which were admitted in evidence). The vessel's length is 33 feet, beam 8 feet. That was the record that existed on December 5, 1927.

TESTIMONY OF PETER J. CARLSON, FOR PLAINTIFF.

PETER J. CARLSON called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

My name is Peter J. Carlson. I am a resident of Tacoma. I am a fisherman and boat builder, and was so engaged in 1926 and 1927. I have built boats for more than twenty years. I built the "Magna" in 1926. (The balance of this wit-

(Testimony of Peter Garvey.)

ness' testimony relates to valuations not involved in the appeal.)

TESTIMONY OF PETER GARVEY, FOR PLAINTIFF.

PETER GARVEY called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

My name is Peter Garvey. I live in Everett, Washington. I am engaged in painting boats. I am employed by the Puget Sound [35] Navigation Company. I was employed by them on December 5, 1927. On that day I was a deck-hand on the "Olympic." On that day the boat left the Colman Dock at 4:30. I went on lookout. I recall the collision with the fishing boat. For three or four minutes before the collision I was fixing curtains on the windows. The windows shown on Plaintiff's Exhibit 2. The curtains are made of canvass. They are already attached to the house. You just pull a little string and they drop down. There are hooks underneath with eyes in them and you hook them with them. I as doing that at the time of the collision and had been possibly for three or four minutes. On lookout I stand in the bow of the vessel. I imagine the windows are about forty feet from the bow. My back was forward and I was facing aft. I was using my hands to fasten the curtains.

Cross-examination.

On cross-examination the witness further testi-

(Testimony of Peter Garvey.)

fied: As we came around West Point there was a spray coming over the bow of the "Olympic." If you were standing in the bow of the ship the wind itself would affect your eyes so that you could not really see anything. If you were back where I was standing, where I was putting those curtains down, you know, not exactly back that far, but you would have to be back quite aways to keep the wind out of your eyes and the spraying of the water. It was blowing fresh at the time and some spray was coming over the bow. I would normally stand under those conditions forward of the stairway, about twenty feet from the bow, about ten feet from the windows. I put the curtains down. They were not down when I went on watch. I put them down just before we had the collision. Before that I had been on lookout. I had been looking ahead. I had seen West Point light. [36]

TESTIMONY OF HANS NELSON, FOR PLAINTIFF.

HANS NELSON, the plaintiff, called as witness in his own behalf, having been first duly sworn, testified as follows:

My name is Hans Nelson. I am the plaintiff in this case. I live at Poulsbo, and I am a fisherman, and have been since I was twelve years old. In 1927 I owned the "Magna." After January, 1927, I was the sole owner until she was lost. (Witness here testifies as to construction and value of

(Testimony of Hans Nelson.)

the boat.) On December 5, 1927, I left the Standard Oil Dock at Salmon Bay at 4:30 in the afternoon, and went out of the locks. When I got outside it was blowing westerly, a good breeze, westerly wind, and I got out and by the light and took a course west by west, going across the sound, and I was standing steering and watching the boat, and I never knew anything before there was something hitting me. It was daylight at the time I left the locks and when I got out there to the lights I put a light in the lantern and put up the lights on the boat. I put up the two side lights and the masthead light and the stern light. The masthead light was a bright light in the front of the pilot-house. It shows three points around the vessel. It shows a little bit abaft the beam. It was an electric light. It was located on the bow on top of the pilot-house on the front end of the pilot-house and facing forward. The side lights were the usual green and red lights. They were on the back end of the pilot-house with a screen on each side. In addition, I had one light hanging in the back of the pilot-house, right in the door of the pilot-house, two inches inside of the door. The pilot-house is five feet above the main deck. The pilot-house is located forward on top of the trunk cabin. The trunk cabin extends twelve inches above the main deck, and the pilot-house [37] is five feet high. The after side of the pilot-house would be about the forward half of the boat. The door

(Testimony of Hans Nelson.)

of the pilot-house opens aft on the starboard side of the pilot-house. Looking forward you step right from the main deck through this door into the pilot-house. There is a bulkhead there on the cabin. There is a foot and a half from the decking where you step over going to the pilot-house, so the door of the pilot-house is five feet high from that there. The light is right in the middle of the door, a six-volt electric light connected with the light system on the engine. The bulb was the same as Plaintiff's Exhibit 7, which was thereupon admitted in evidence. The light was hanging on an extension cord two inches inside of the door. It was a solid door open at the time of the collision, and all the time, The light was lighted at the time of the collision. It had been right from the time *the time* that I lighted the lights at Ballard. The side lights were lighted when I left Ballard. The cabin light was not lighted when I left Ballard. When I got out to the light in Ballard then the light was burning. I put the light on about 100 feet from shore. I had the lights burning after that, including the light in the door. There was nothing aft of the light. That light can show all over the after part of the boat.

Thereupon the following proceedings were had:

Q. Could anybody see that light suspended in the door of your vessel—in that open door, approaching from the stern?

(Testimony of Hans Nelson.)

Mr. BRONSON.—I object to that as calling for a conclusion.

A. Yes.

The COURT.—Overruled.

Mr. BRONSON.—Exception.

Q. Hans, did you ever have occasion to be away from your own vessel at night-time, either on the shore or on another vessel, [38] when you could see that light suspended in the doorway of your cabin?

Mr. BRONSON.—I object to that as immaterial, your Honor.

Mr. MARTIN.—It bears upon the—

The COURT.—(Interrupting.) Overruled.

Mr. BRONSON.—Exception.

Q. Go ahead. Did you? A. Yes, sir.

Q. How far could you see that light when the light was on and when it was hanging in the doorway, suspended as it was at the time of the collision?

Mr. BRONSON.—I object to that.

The COURT.—Overruled.

Mr. BRONSON.—Exception.

A. Half a mile away.

Q. Have you actually seen that light half a mile away?

Mr. BRONSON.—I object to that.

The COURT.—Overruled.

Mr. BRONSON.—Exception.

A. Yes, I have been on shore many times, and I have had that light burning, and I have seen it. I seen that light on my own boat.

(Testimony of Hans Nelson.)

The witness further testified as follows: At the time of the collision it was just in the twilight. It was not dark and it was not regular daylight, I estimate, because the collision occurred around five o'clock and my watch stopped at 5:15, and I figured that it was around fifteen minutes that I was there. During that time I was on the boat first. At the time the ferry struck me I fell down [39] between the engine and the tanks, and I got up from there and I was hanging with one hand on the steering-wheel and the other hand on the front, and they broke the rudder chain so that the boat was turning around and I got up and went out on the deck and I seen that the ferry-boat was up to the window. I never knew what struck me in the first place until I saw that boat and then he was backing up. He was about a quarter of a mile away. (Witness here testified as to personal injuries not involved in appeal.) I went overboard after I seen that the boat was filling up fast, that it was mostly sinking, and I was afraid that I would go down with the boat, and I took a hatch and threw it overboard and I jumped for that away from the boat. The "Magna" sank. I could see easily a half a mile on the water. I saw a towboat that was coming towing logs. I had an open window in the pilot-house. I saw the towboat coming in, and he had not had any light on at that time. I seen him first and that was before the ferry struck me. I saw the towboat through the window about a half a mile away, about eight minutes before the collision.

(Testimony of Hans Nelson.)

Thereupon the following proceedings were had:

Q. How far could you see any vessel ahead of you, a vessel of the size of the "Magna"?

Mr. BRONSON.—I object to that as speculative and calling for a conclusion.

The COURT.—Overruled.

Mr. BRONSON.—Exception.

A. You could see a vessel like the "Magna" a quarter of a mile away, easy, at the time of that collision.

The witness further testified: It was a full moon. The moon was not yet up. It was [40] not dark enough to see the moon at the time of the collision, and the moon came up a little afterwards. After I got aboard the ferry then the moon was up. At the time of the collision the sky was clear. The wind was westerly blowing a good breeze, westerly wind. There was a heavy sea and the tide was going up with the wind, and that makes kind of big swells. My boat was about in the middle of the sound, about three quarters of a mile north of West Point, northwest of West Point.

Thereupon the following proceedings took place.

Mr. MARTIN.—If your Honor please, I have a little picture here, your Honor—a photograph of a vessel not the "Magna," but one I would like to introduce for the purpose of illustration.

Cross-examination.

On cross-examination the witness further testified:

(Testimony of Hans Nelson.)

It was 4:30 when I left at the locks. It was daylight then. The sun was not shining but it was daylight yet. The sun wasn't shining because it was just going back of the mountains. About 4:45 I got through the locks and the sun was just going down behind the mountains then. That was about 4:40, and the sun was just going behind the mountains. The sky was clear to the west, no clouds, and no moon in sight. At that time I was just outside the railroad bridge. (Witness marked cross on chart at point indicated. Defendant's Exhibit 11.) I was heading for Suquamish. That is shown on the chart. At 4:40 I was still in the entrance of the canal. My vessel made about 5½ miles an hour. The collision occcurred about 5 o'clock. I didn't look at the watch. The last time I looked at the watch was when I left Ballard at 4:30. I never again looked at any watch or clock. I was judging that it was about 5 o'clock. My watch [41] stopped at 5:15. From 4:30 on I simply estimate the time. About four minutes after I saw this tug about half a mile away the tug's lights went on. I wasn't up to the tug at that time. The tug was away out from me. It came from Richmond Beach that way, and I went further across. I went further away from the tug rather than closer to it. When my boat was built it had three navigation lights on it, two side lights and one bow light, and the light behind on the boat. At that time there were four lights. Those lights were two side lights, one head

(Testimony of Hans Nelson.)

light and one mast light. The mast light is the light you use when you have the mast on the boat. I had no mast on the boat. I testified before the Local Inspectors and I testified before at this trial that I had a pole mast at the after end of the vessel, and that I had taken it off. I testified that I had taken it off the boat, but it was not at that time. It had a mast on before I went to Ballard, aft of the pilot-house, and that had a light on top of it, a light that showed all around the horizon. We had the light on the mast at the time we had the mast up. It shown all around the horizon. I took this mast out of the boat before I went to Ballard. I didn't have it on when the collision occurred, and I didn't have it on when I went out from Ballard, and the mast and light were missing at the time I came out in the Sound on the evening of the collision. I had another light on the boat that I normally carry, a six-volt light, a white light, and it would shine aft of the beam of the boat and aft. That showed from the stern of the vessel.

(The COURT.—I think you are both confused. You are talking about what he calls the bow light and he thinks you are talking about the light on the pole.)

I had five lights up. I had a green, a red and a white. Those are the bow running lights. You could not see [42] those lights from the stern. You are not supposed to see them on the stern.

(Testimony of Hans Nelson.)

They are screened so that they do not show that way. The light that had been on the boat mast was not there but there was a light behind in place of that. I had a light in the cabin too, and them lights were showing, and there was a light back in the pilot-house in the door of the pilot-house, and that showed all that part of the boat. I never went outside of the wheel-house after I left Ballard. After the collision I went out, but up to that time I had been inside navigating the vessel. I did not have time to look astern of the ship to see what was coming in that direction. I never looked at all. I don't have to look back. I was looking to the windward. That was the only way I had to look. I was not wrong coming up into the wind. I had the right of way. If a vessel overtook me there he had to give me a warning. I had a six-volt light system, a 6–8 volt Robertson dynamo, 10 watts, that was running with the engine. We had batteries when the engines stopped. One battery will burn five of those lights without a dynamo. The light that was hanging on a suspension cord was right in the pilot-house with me. The pilot-house is 5x4. I could see out of this room with a light on there to navigate the vessel. I could see what I could see in the light. It was not dark. At the time of the collision you could see without lights. The light in the little room would not bother my eyes. I was standing steering when the ferry hit. My vessel was on its course running with the

(Testimony of Hans Nelson.)

engine. I was headed west northwest. I wasn't rolling much in the sea. There was a little spray once in a while, and that was all there was. The wind was coming from the west northwest. I was heading into the wind. The swell was more northerly so it was going a little more on its [43] side. At the time the ferry struck me I was heading for Indianola. I was then about half a mile from West Point in the direction of north northwest. (Witness then indicated with a circle the point where collision took place on chart, Defendant's Exhibit 11.) We were then a little over a mile from the blinker. I cannot say how long I had been running. I should judge I had been out from Ballard about half an hour. There were no clouds in the sky. I cannot say whether the moon was shining. I could not see the moon. I could not see any sign of the moon, but I saw the moon later when I was in the water. And after my vessel was hit it broke the rudder chain and I proceeded at random. It was hanging on the ferry and it broke the door of the pilot-house at the time that it was hanging on the ferry. I jumped overboard before my boat sank. It was pretty nearly sunk. I was just hanging onto the cabin and the pilot-house. I have two life-rings on the boat. They were on top of the pilot-house. They were fastened. We had to have them fastened when we were out fishing. We never used them life-preservers and I took the first thing that I could see that I could

(Testimony of Hans Nelson.)

throw overboard. There was a big hatch on top of the place where the fish is put in and I threw it overboard and I put my hand on that and it held me up, but when I got in the tide it was not strong enough to hold me up so I went down twice with that. My life-preservers were lashed down in the pilot-house so I could not pick up one of them and jump overboard with it.

Redirect Examination.

On redirect examination the witness testified as follows:

The hull of my boat was exactly the same as the hull of the boat in the photograph. It was a double ended vessel [44] like that and it had the same pilot-house. It is arranged the same way and here is the mast and the pole. Everything is all there on that picture, though that picture doesn't show aft as it does on my boat. I mean that I did not have any mast or pole. The same deck arrangement. The back part of the pilot-house on the "Magna" was all straight. There was no overhang on it. (Thereupon the photograph was admitted in evidence as Plaintiff's Exhibit 8.) The "Olympic" cut in clear to the keel. There was a water tank back there and it shoved that water tank straight up through the hatch. There is the trolling hatch where we stand when we fish and it cut across that hatch clear into the keel, and through that tank and the planks and the side opened up so that all the water went in there.

(Testimony of Hans Nelson.)

Recross-examination.

On recross-examination the witness further testified:

My vessel did not have trolling masts. There was a smokestack on the forecastle. The trunk cabin on the boat was forward of the wheel-house.

Redirect Examination.

On redirect examination the witness testified as follows:

I have been around the Sound and in and around the Locks at West Point about twelve years. At that point there is all the traffic that goes from Seattle in and out.

Recross-examination.

On recross-examination the witness further testified:

All the ships pass West Point that go to Seattle. The place where the "Magna" was at the time of the collision was the path where the ships go in and out of Seattle, and I was crossing that path. [45]

(At this point an extract from the Weather Bureau records was introduced in evidence as Plaintiff's Exhibit 9.)

Thereupon the following proceedings took place:

The COURT.—Go to the defense.

Mr. BRONSON.—If your Honor please, I would like to make a motion.

The COURT.—Very well, proceed.

Mr. BRONSON.—We at this time move the court for a directed verdict.

The COURT.—Are you resting your case at this time?

Mr. BRONSON.—I beg your pardon?

The COURT.—Are you resting your case?

Mr. BRONSON.—No, I am not resting my case. I am challenging the sufficiency of the evidence plaintiff has produced to justify a verdict in favor of the plaintiff under any circumstance.

The COURT.—Proceed.

Mr. BRONSON.—The plaintiff in this case has admitted that he did not have the lights required by the law. He has admitted that it was after sunset. He has admitted that he was—

The COURT.—(Interrupting.) What was sunset that day?

Mr. BRONSON.—I beg your pardon?

The COURT.—When did the sun set that day? There is no evidence about that.

Mr. BRONSON.—He testified that the sun set at the Ballard Bridge just as he was coming out under the railroad bridge. He said that it was 4:40.

The COURT.—He said that it was going behind the mountains.

Mr. BRONSON.—Yes. [46]

The COURT.—Is that sun setting when it goes behind the mountains? I doubt it.

Mr. BRONSON.—That is his own evidence, that the sun had set.

The COURT.—I know, but how is sunset and sunrise measured under the law?

Mr. BRONSON.—Under the law, sunset is measured by when the sun's upper rim disappears upon a water level horizon.

The COURT.—The law requires a light after sunset. Now, what does that mean? Proceed with your motion. I asked you what evidence there was of sunset, but if there is none in the record, I suppose it can be judically noted that it is fixed by the table.

Mr. BRONSON.—That is the basis of my motion, your Honor, that under the law, it being admitted that he was proceeding with lights that did not come up to the prescribed lights prescribed by statute, he is guilty of negligence as a matter of law, and the burden is upon him to prove that his failure to carry the proper lights could not have been one of the causes of the collision.

Now, there certainly is no evidence in this case whatsoever from which any reasonable person would assume that the absence to have this light, which the law requires and the light which this witness admitted that his vessel had been equipped with originally, was not one of the causes of the collision.

Since this is an action at law and not an Admiralty proceeding, contributory negligence is a complete bar, irrespective of any action or failure of per-

(Testimony of William Seatter.)

formance on the part of the defendant, and I think at this time there is [47] not anything left for determination by anyone other than whether, as a matter of law, this plaintiff was guilty of contributory negligence.

The COURT.—I am of the opinion that as the case now stands, it ought to go to the jury. The Court would be justified in referring it to the jury. The motion will be denied.

Mr. BRONSON.—Exception.

The COURT.—Call your witness.

Thereupon the following proceedings took place:

TESTIMONY OF WILLIAM SEATTER, FOR DEFENDANT.

WILLIAM SEATTER, called as a witness on behalf of defendant, being first duly sworn, was examined and testified as follows:

My name is William Seatter. I live at Kingston. I am employed by the Puget Sound Navigation Company and was so employed on the 5th day of December, 1927. I was on the steamer "Olympic" as a watchman. I remember the day of the collision with the "Magna," and I was on the "Olympic" that day. The boat left Seattle at 4:30; that is her scheduled time. The lights were burning at the time. I always look at them when we left. It is part of my duty. After leaving the Colman Dock at 4:30 in the afternoon the whether was choppy. There was quite a wind from

(Testimony of William Seatter.)

the northwest. I went out and looked at the side lights, the head light and the stern light. At five o'clock I took the wheel. The vessel was at West Point. That was the time I was supposed to go on watch. My duties at the wheel are to steer. The captain was in the pilot-house. His name is Louis Van Bogaert. He was looking out of the window. The wheel is right in front of the window. It is directly back of the window. [48] I stood at the wheel facing forward. There is a window in front of me as I stand, about two or three feet. I was standing on the starboard side of the cabin. He was on the port side, almost right dead ahead of me on the port side. He was looking out of the front windows. The windows were open. At West Point the sea was quite choppy. The seas was from the northwest and the wind was coming from that direction. At that time it was quite dark. I could not see the hills and the shore on the sides of the Sound as we went along. I did not see any light ahead of us at all. I could not see a quarter of a mile to make out waves or anything on the water. The waves had little white caps on. We had proceeded I should say nineteen or twenty minutes, something like that, after leaving West Point before anything happened. I don't know what happened. I was at the wheel at the time and something happened. I don't know what it was. I did not see anything ahead at all. I looked out of the window ahead at times. If there had been any light ahead I should have seen

(Testimony of William Seatter.)

it. I looked out when we struck this object and I did not see any lights at all. The first time that I saw the sign of an object was about 5:18 or 5:20. I didn't see any boat. I didn't see anything of a boat after the collision. There is a searchlight on top of the pilot-house in the "Olympic." I didn't have anything to do with the searchlight.

Cross-examination.

On cross-examination the witness further testified:

The pilot-house of the "Olympic" is so designed as to permit a person to stand behind it and look forward out of the window. There is room for a person to pass in front of the wheel between the windows and the wheel, about two feet and a half, something like that. The captain was standing looking out [49] of the window a little on the port side, looking out of the window. I was steering the boat by compass. Once in a while I can take a look out of the window. The compass bowl is arranged so that I can look right down at it. I always do look out of the window. They had a lookout on the bow of the ship. The master was occupying one of the windows and I could not see out of that one. I was looking out about a minute before the collision. I didn't say anything before the impact and I did not see anything after the impact. I knew that we had gotten in collision with some object but I didn't know what it was. I testified before the Local Steamboat Inspectors

(Testimony of William Scatter.)

on December 6, 1927. I there testified that I did not see any lights on the fishing boat before the collision. The first knowledge I had of the collision was when I saw an object ahead which proved to be the fishing boat. I didn't know whether it was a boat or not. I knew it was an object. The weather was clear. I didn't see any moon. It was dusk. It was that state between light and dark that you could see an object out of the water out ahead of you if you were looking. If there was a vessel ahead of you you could see her 1,000 feet ahead and you could see that vessel without any artificial lights before the collision. I would not say that it was light enough to see an object out there without an artificial light because I know it was quite dark. I know that.

Redirect Examination.

It was pretty dark at that time. I was not able to see the headlands, that is, the land on either side of the Sound.

TESTIMONY OF PETER GARVEY, FOR DEFENDANT (RECALLED).

PETER GARVEY, a witness recalled on behalf of the defendant, being previously sworn, testified as follows: [50]

I testified that about three or four minutes before the collision I was fastening some curtains on the cabin windows. Prior to that time I was look-

(Testimony of Peter Garvey.)

ing out, walking back and forth on the bow. I did not see any lights ahead at all. I could see the light on West Point, and I could see the light on Apple Cove Point. I could not see any other lights in the neighborhood ahead at all. That was just before I started to fasten the curtains. I had not seen any sign of the vessel without lights ahead at all.

Cross-examination.

On cross-examination the witness further testified:

I was lookout before I started to put up the curtain. I was engaged in putting up the curtain for about three or four minutes. It doesn't take that long to put the curtains up because you just pull a little string and they flop down and you just hook them onto the bottom of the window. I had my back to the bow while fixing the curtain. Before that I was on lookout looking back and forth on the bow. It took me possibly four or five minutes to fix the curtains, to the best of my knowledge, and during those four or five minutes I was not giving attention to looking out. It was dark at that time,—well dusk or whatever you want to call it. It was dusk or dark. When I said dusk before the local Steamboat Inspectors I meant dark. It was not light enough to see the hull of this little vessel off on the water without the aid of artificial lights. I remember talking to you and another gentleman on the Colman Dock before the

(Testimony of Peter Garvey.)

other trial. You and Mr. Redpath talked to me about the case at the time I was subpoenaed. I did not say to you or Mr. Redpath that it was light enough to see the hull of the "Magna" a half a mile away on the water in answer to any questions. I absolutely made no such statements. I said nothing of the kind. I did not say, [51] "sure I could" in answer to any question by you as "then it was not necessary to have a light on the hull because you could see it so clearly half a mile away." I never said that you could see very plainly out on the water from the "Olympic," or anything of the kind, or words to that effect.

Redirect Examination.

On redirect examination the witness further testified:

Things which counsel has asked me as being statements that I made were absolutely not true. I never said nothing of the kind.

At this point court was adjourned until ten o'clock of the morning of the following day, May 6, 1931.

Upon court convening, the following proceedings were had:

TESTIMONY OF WILLIAM J. MALONEY, FOR DEFENDANT.

WILLIAM J. MALONEY, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

(Testimony of William J. Maloney.)

My name is William J. Maloney, address 404 Colman Building. I am a marine surveyor. I am a master mariner, master of ocean vessels, steamer and sail, and have a pilot's license for all ports of the United States. I have a master's and pilot's license since 1905. I have had experience in navigation of vessels. I surveyed the "Magna" at one time and I am familiar with her. As to the effect of having a naked white light in the wheel-house on a small vessel such as that vessel had and endeavoring to operate that vessel after sundown, I doubt very much if you could see anything with a light in the pilot-house. I really do not think you could see out very good with a light in the pilot-house of any description. [52]

TESTIMONY OF WILLIAM SEATTER, FOR DEFENDANT (RECALLED).

WILLIAM SEATTER, recalled as a witness by the defendant, testified as follows:

I testified yesterday but I don't remember anything about the searchlight. I have had an illness affecting my mind since the date of the last trial. I am subject to epileptic fits and I know that that has had *a*ffect upon my memory. I did not talk to you before I came up to testify this time. I don't remember whether I testified at the former trial that I operated a searchlight after the collision between the vessels. Sometimes I remember good and sometimes I do not. I don't re-

(Testimony of William Seatter.)

member now whether or not that I testified at the former trial that I operated a searchlight after the collision. I first told you about these spells that I have had yesterday after court adjourned.

Thereafter the following proceedings occurred:

Mr. BRONSON.—If the Court please, I would like the record to show that we have been taken by surprise by this witness.

The WITNESS.—I have got witnesses to that effect, that I have always been subject to fits.

Mr. BRONSON.—That witness has testified almost directly opposite to his testimony at the preceding trial, and he has been called as a witness by the defendant in this case, and I desire to show, if your Honor please, the sudden change which has occurred in his testimony.

The COURT.—Well, the other testimony is not before the jury at all.

Mr. BRONSON.—That is precisely what I wish to show, your Honor.

The COURT.—He says that he remembers at times, and that he does not remember at other times, and that is before [53] the jury, and that is all you are entitled to. Proceed with anything further that you have with this witness.

Q. I would like to ask you if you did not testify as follows at the former trial: "Were you able to see the headlands on either side of the Sound after passing the Point?" And your answer: "No, sir." A. No, sir; I was not.

Mr. MARTIN.—Just a moment. I object to that.

The COURT.—If this is not for the purpose of refreshing his recollection so that he may testify now but merely an indirect way of getting his former testimony into the record, as it looks now, the objection is good and it will be sustained.

Mr. BRONSON.—If the Court please, I desire to make a showing at this time that we have been taken by surprise by this witness, and his testimony here is obviously not testimony with reference to the facts, and I think we are entitled to show that the witness testified entirely different than he testified here—testified entirely different at a former trial, and that this is without any fair warning or notice to us.

The COURT.—If you can show me any authority for your position, I might consider your motion more seriously. You want to show what, now?

Mr. BRONSON.—This witness has testified that he has had a failure of memory.

The COURT.—Very well.

Mr. BRONSON.—And I am asking him if he did not testify in a certain way. In other words, I am impeaching my own witness. That is what I am doing, and I think under all the authorities, we are entitled to do that where a witness [54] takes an attorney by surprise and testifies differently than the attorney has reasonable grounds to believe that he will testify. Your Honor heard the witness testify before—

(Testimony of William Seatter.)

The COURT. — (Interrupting.) It is not within my memory. I have heard *thousand* of cases here, and you could not expect me to remember what the witness said before.

Mr. BRONSON.—We have the record in the former hearing right here, certified by your Honor, and I think we are entitled to show that this man's testimony now is almost diametrically opposed to what it was at the former trial. Having been taken by surprise; I think we are entitled to show that.

Mr. MARTIN.—Let me ask this question. How long have you been suffering, Mr. Seatter, from this ailment that you speak of?

The WITNESS.—All my life.

Mr. MARTIN.—And your condition to-day is in nowise different from what your condition was when you testified at the former trial?

The WITNESS.—Some days it is, and some days it is not. Some days I remember good, and some days I do not remember at all. I may be sitting here now, and in a second I might be off.

Mr. MARTIN.—In view of that, I renew my objection on the ground that it is not competent testimony.

The COURT.—Do you ever remember things that do not happen, or think that you remember them? How about that?

The WITNESS.—I do not know how that would be, I am sure.

(Testimony of Harry John Whaley.)

The COURT.—Well, we will let it go until this afternoon. [55] We will not finish this case anyway before that time. You can show me some authorities by that time, I presume, Counsel, and then you can call him again.

Mr. BRONSON.—Very well. You step down, Mr. Seatter. However, I want you to remain in attendance on the court please, Mr. Seatter.

TESTIMONY OF HARRY JOHN WHALEY, FOR DEFENDANT.

HARRY JOHN WHALEY, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

My name is Harry John Whaley. I live at 9233–39th Ave. South, Seattle, Washington. I am a master mariner. I have held a master's license, first class, on Puget Sound since December 12, 1929. Prior to that I held a first class mate of lakes, bays and sounds and second class pilot of Puget Sound and adjacent waters. I have held such a license for seven years. At the present time I am in the wholesale fuel business for myself. In 1927, December, I was employed by the Puget Sound Navigation Company as first mate on the "Olympic" and was aboard that vessel when she left Seattle the afternoon of December 5, as first officer. The vessel left Seattle, as I remember, at 4:31 or 4:32. The regular schedule is 4:30, but it takes a minute or a minute and a half to get away.

(Testimony of Harry John Whaley.)

When the master of the vessel gave the let go whistle I gave orders for the line to be cast loose and I walked to the stern of the vessel and stood there while he was backing out, so that no traffic would come across us and when he put her on the course I relieved the skipper so that he could go down and have his supper. The weather at that time was kind of heavy and very cloudy, so that it was slightly dim. The lights were on the vessel at the time. The vessel proceeded on her course to Port Townsend. The first [56] change that I put her on was at Four Mile Rock. I relieved the captain. He gave me the course and I repeated it back to him, and then he went down to eat. I took charge of the vessel until he returned. I was then in the pilot-house. With me was the quartermaster. As I remember the vessel arrived off West Point about 5:01 or 5:02. At that time there was a very strong northwest wind and overhanging heavy clouds which cut off the headlands so that they could not be seen. It was dark. The only light which was visible was the Shilshole auto light. That is what is called the blinker light. I remained in charge of the navigation of the vessel up to Four Mile Rock. I then stepped back into my room and washed up, and then walked out around the pilot-house. I always went down the forward stairs as a rule, and the skipper was just changing the course at West Point. (Witness indicates position of Four Mile Rock and West Point on chart. Defendant's Exhibit 11.) The

(Testimony of Harry John Whaley.)

blinker light is right at the entrance to the Lake Washington ship canal, that is where you come in and start to go up to the Locks. I don't know anything about the collision until the shipper had blown the signal calling the crew to the boats. He blew the regular boat whistle, three blasts of the whistle. I was down in the lunch-counter eating I left my meal and came right up to the boat deck. I didn't see anything. I went and took my station,—that is No. 2 of the port side. I saw no sign of any vessel in the vicinity of the "Olympic" at that time. The "Olympic" was backing. When I was setting down eating my dinner the first thing I heard was the ringing of the telegraph, which you can hear pretty much all over the "Olympic," and the first thing I knew I felt a strong vibration and the skipper gave the call to go to the stations, and the boat was backing up pretty hard at [57] that time. You can tell that by the vibration. I didn't see anything of this small boat until I was talking to the skipper. I spoke to him and asked him if he had hit anything, and he said he didn't know for sure yet. Just then we happened to turn around and I saw a dark object on the water. I could not make it out until finally somebody came out of the cabin. Then I could see him on the deck. This object was about seventy-five feet from the stern of the "Olympic." The "Olympic" was then backing up. She was coming back. I did not see any lights on this boat until his boat had turned around. The captain gave orders to lower

(Testimony of Harry John Whaley.)

the boat and when he gave orders to lower the boat, my attention was attracted from that then until she was launched. After we lowered the boat and started the crew off I saw the boat again. It was about fifty feet from the boat that they had the searchlight on the man who was in the water. I did not see the man when he got into the water. It was then dark. You could not see anything without a searchlight. The searchlight had been played on the boat. That was how I happened to see him come out of his cabin, was through the searchlight. The searchlight was on the pilot-house of the "Olympic." The sky was cloudy. I did not see any sign of a moonlight on the water. The wind was strong from the northwest. The sea was rolling pretty heavy,—enough to fetch spray over the bow of the "Olympic." The visibility was a very short distance. I saw this man after he was picked up. I helped him in the boat when they came to the ship. I raised the boat and helped to put him in the skipper's room. The skipper gave me orders to undress him and give him some of his clothes to put on. I carried those orders out. I did not see any sign of injury on him. I asked the gentlemen if he was hurt or bruised in any way and he [58] said he was not. I talked to him about the accident. I asked him, "Gee, it's a wonder that you could not see the 'Olympic' coming," and he said, "Well, I looked around and I could not see anything, or hear, and I went down to oil or fix my light generator," or

(Testimony of Harry John Whaley.)

something to that effect. I don't recall exactly what was said, and he told me that when we hit him that he fell over on the engine. I asked him where his range light was, and he said, "Well, my mast,"—I forget just exactly whether he said it was broken and he left it in Ballard to fix or what, but he said that he had left his mast behind. Then I think he said something about money being in his clothes that had been taken down to the boiler-room, and I sent one of the boys down to get the money and to return it. I was the one who took his watch out of his pocket. I took that out of his pants myself and gave it to Roy Neal to take to the master. This man had no appearance of any physical injuries to be seen when he was changing his clothes. To my experience a white light in the wheel-house to navigate with is an impossibility. The light blinds you. It blinds you so that it is just as if you do not shut off the little dash light on your car when driving at night. It is just the same thing with having a white light burning in the wheel-house. It is strictly against the law, and is never permitted in the pilot-house of a vessel.

Cross-examination.

On cross-examination the witness further testified:

I was in the wheel-house from the time we got clear of the dock until we got to Four Mile Rock. That would be a matter of eighteen or nineteen minutes. As I came out of my room and started below

(Testimony of Harry John Whaley.)

at West Point, I stopped and particularly looked at the condition of the sky. It is always the nature of seafaring [59] men when we come out of our room to look at the weather conditions. It was more cloudy then then at 4:30. I distinctly remember that the cloudiness had increased. The sky was overcast. I couldn't see any stars at all. I did not see any moon at all. It was just dark. Practically just as dark as night. The light had disappeared because the sun had set at 4:17. It was absolutely dark at five o'clock. That is my recollection. It was darker then than it was at eleven o'clock. I was on deck two or three minutes at the pilot-house before going below, and the next thing I knew about the affair was the telegraph bells and vibration of the vessel when going astern. The first thing I saw of anything on the water was after I had talked to the skipper and turned to go back to my station. My station is only about ten or fifteen feet from the pilot-house. When I turned around and the searchlight played on the boat I first saw this object. I could not see anything until the searchlight was put in use. I remember testifying at the former trial that I went and reported to the captain and that it was dark, and there was a strong northwest wind blowing about a twenty or twenty-two mile gale. I remember stating that I didn't see any floating object in the vicinity until I happened to turn and I noticed a dark object going past our stern, and I just stated in my testimony when I was talking to Mr. Bronson that

(Testimony of Harry John Whaley.)

I had seen a dark object but I didn't know what it was until they had played a searchlight on it. I said that I didn't see any lights on it until the boat had turned around. I meant the little fishing boat. I then saw a red light. I should judge that we never got more than six or seven hundred feet from the "Magna." It was dark when I left the wheel-house at Four Mile Rock,—not quite as dark as it was when we were called to the boat, or when I came out of the wheel-house. We ordinarily [60] put the curtains down on the main deck when the lights are turned on in the forward cabin. But the lights are not always turned on the forward part of the cabin until it commences to get dark. The purpose of putting the curtains down is so the light won't show out ahead and thus interfere with the navigation of the vessel. The curtains are not put up until it commences to get dark and the lights are turned on.

TESTIMONY OF LAWRENCE C. FISHER, FOR DEFENDANT.

LAWRENCE C. FISHER, called as a witness on behalf of defendant, having been first duly sworn, testified as follows:

My name is Lawrence C. Fisher. I live in Seattle. I am a Meteorologist of the United States Weather Bureau of Seattle. The office of the Bureau is in the Hoge Building, and that is where our observations are taken for this port. I have

(Testimony of Lawrence C. Fisher.)

brought the records of the United States Weather Bureau here at your request. On December 5, 1927, the sun set at 4:17 P. M. I mean by that, the upper rim disappeared beneath the ideal horizon,—the sea level horizon. The upper rim is the upper edge of the sun, and the upper edge of the sun had disappeared below the water level horizon at 4:17 between the hours of four and five. Wind velocities of twenty miles were actually recorded; between five and six, seventeen miles; between six and seven, ten miles. The records show that the sun went down behind these clouds. The sun was obscure. The prevailing direction of the wind for the hour from four to five was from the northwest. This being December 5th, it is my opinion that the sun would set to the south of true west. On that day civil twilight would continue for thirty-five minutes. One way of defining civil twilight is that it is the length of time after sunset, in this case [61] until the upper rim of the sun was six degrees below the horizon. That is the period of time during which ordinary outdoor occupations are regarded as possible. At the end of the period of civil twilight one would get out of the period of practical twilight. The end of civil twilight on December 5th was 4:52. Regular telegraph observations started at twenty minutes to five, and at that time on that evening the state of the sky was regarded as clear. There were a few cumulus clouds observed from the Hoge Building roof. Our records do not show the condition of the sky nine or ten miles northwest of the city. There

(Testimony of Lawrence C. Fisher.)

is nothing to show the actual distribution of the clouds. It was recorded as full. The end of civil twilight is always taken at ideal conditions, that is at water level horizon and cloudless sky. If the sun set behind clouds that would shorten the period of civil twilight. It would also affect the degree of darkness which would come on at the end of the twilight. Our records show that the sun setting behind a solid bank of clouds was obscured. The clouds, of course, were in the west. According to the definition of civil twilight it is more or less dependent upon the cloudiness of the sky after sunset, and the period of practical twilight is dependent upon the clearness of the sky. The sun setting behind clouds will advance the time of the end of civil twilight.

Cross-examination.

On cross-examination the witness further testified: I would not say that the condition of cloudiness in the western sky was observed from the roof of the Hoge Building. It may have been taken from one of the windows. It is one of the duties of the observers to take note of the sunset and sunrise. The kind of clouds at sunset for that day is not recorded. [62] The kind of clouds at the observation taken immediately before five o'clock was cumulus clouds. Cumulus clouds are thick clouds. At twenty minutes to five there were still a few clouds. I would suppose that the dark clouds behind which the sun is recorded to have set would have been on the western horizon. There is nothing to show the

(Testimony of Lawrence C. Fisher.)

distribution of the other clouds. The sum total of the clouds was less than one-half of one-tenth of the sky. So far as the surface conditions are concerned the storm condition of the afternoon was quieting down. I don't think that it always follows that the sky condition clears with the wind dying down The moon on December 5th rose at 2:47 P. M. That is the upper rim of the moon just reached an assumed ideal horizon. The moon was approaching the full. Two days later the moon was full. My recollection is that that was on the 8th. My certificate confirms that. Ordinarily, it takes about seven days for the moon to pass from one phase to the next phase, and there are four phases. This would be the second quarter. At the first quarter it is half a moon. The jury understands what is meant by a full moon. This is just halfway between the first quarter and the full moon. At five o'clock on December 5th, the moon would be roughly sixty degrees from the zenith. That would be about one-third of the way from the horizon to the zenith. I have no records and would not care to express an opinion whether the moon was showing over the waters of Elliott Bay at five o'clock. Astronomical twilight continues from the time that the upper rim of the sun disappears below the horizon until the center of the sun is eighteen degrees below the horizon. That is one hour and fifty-one minutes. It is possible that there would be still some light in the west. The end of astronomical twilight ends the light of day, and from then on there is only the

(Testimony of Lawrence C. Fisher.)

astral light in [63] the sky. Astronomically that is correct. The end of civil twilight occurs when the center of the sun is six degrees below the horizon. To a certain extent that is an arbitraty period. That is fixed at thirty-five minutes at Seattle. The only statement that I can add is that between the time that the sun is four degrees below the horizon and six degrees, the statement is given by authorities that the light fades very rapidly.

Redirect Examination.

On redirect examination the witness testified as follows:

Civil twilight is something that has been set up to apply to practical occupations of mankind in the world, and astronomical twilight is something pertaining to instruments and the last physical speck of light in the heaven for scientific purposes.

TESTIMONY OF DONALD S. AMES, FOR DEFENDANT.

DONALD S. AMES, called as a witness on behalf of defendant, having been first duly sworn, testified as follows:

My name is Donald S. Ames. I live in Seattle. I am United States Local Inspector of Steam and Motor Vessels. I hold a license as navigating officer, master of steam, sail and motor, any ocean. I have held such license forty years. I am one of the local inspectors in this district. As such, my duties

(Testimony of Donald S. Ames.)

are the inspecting of all vessels under steam or motor power, with the exception of motor boats under sixty-five feet in length, and also with examining all candidates and granting licenses to those successfully applying for licenses in the deck department and engineer officers. One of my duties is to enforce the local rules and the International rules of navigation as promulgated by the Secretary of Commerce. [64]

Thereafter the following proceedings were had:

Q. How long have you been doing that work?

The COURT.—I will tell your witness to vacate the stand if you do not bring him to the point that you want to ask him about. I told you that his qualifications are sufficiently established. Come to what is material in this case.

Mr. BRONSON.—I want to bring him back to the date of this accident.

The COURT.—He has had a license for forty years. He has told us. Proceed.

Q. I wish you would tell, Captain, what the requirements for a vessel 33 feet in length were on December 5, 1927?

Mr. MARTIN.—I object to that. The laws speaks for itself.

The COURT.—Sustained.

Mr. BRONSON.—Exception.

Q. Captain, handing you Defendant's Exhibit 10 for identification, I will ask you whether or not that is an official publication issued by the Secretary of

(Testimony of Donald S. Ames.)

Commerce, and in effect on the 5th day of December, 1927 (handing document to witness).

A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Mr. BRONSON.—I offer this in evidence, if the Court please.

The COURT.—Admit it.

(Whereupon regulation of motor boats, issued by the Department of Commerce was admitted in evidence as Defendant's Exhibit 10.) [65]

Mr. BRONSON.—That is all.

The COURT.—Well, if you have anything material, present it to the jury right now so that they can know what it all means.

Mr. BRONSON.—I will read Exhibit No. 10 to the jury.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the words 'motor boat' where used in this Act shall include every vessel propelled by machinery and not more than sixty-five feet in length except tugboats and towboats propelled by steam. The length shall be measured—"

The COURT.—(Interrupting.) The jury does not care to hear the whole law. What is there in these rules that you call particularly to the attention of this jury?

Mr. BRONSON.—"That motor boats subject to the provisions of this Act shall be divided into classes as follows:

"Class One. Less than twenty-six feet in length.

(Testimony of Donald S. Ames.)

Class two. Twenty-six feet or over and less than forty feet in length.

Class three. Forty feet or over and not more than sixty-five feet in length.

Sec. 3. That every motor boat in all weathers from sunset to sunrise shall carry the following lights, and during such time no other lights which may be mistaken for those prescribed shall be exhibited.

(a) Every motor boat of class one shall carry the following lights:

First. A white light aft to show all around the horizon."

I will omit that and go to classes two and three.

"(b) Every motor boat of classes two and three shall [66] carry the following lights:

First. A bright white light in the forepart of the vessel as near the stem as practicable, so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side. The glass or lens shall be of not less than the following dimensions:"

I will omit that.

"Second. A white light aft to show all around the horizon."

That pursuant to the provisions of that law, the Secretary of Commerce promulgated certain rules and regulations with reference to those lights, Section 8 of which is as follows:

(Testimony of Louis Van Bogaert.)

"The aft light should be higher and so placed as to form a range with the forward light, and should be clear of house awnings and other obstructions."

The COURT.—Call your next witness.

TESTIMONY OF LOUIS VAN BOGAERT, FOR DEFENDANT.

LOUIS VAN BOGAERT, called as a witness on behalf of defendant, having been first duly sworn, testified as follows:

My name is Louis Van Bogaert. I am a master mariner, employed by the Puget Sound Navigation Company and was so employed on the 5th day of December, 1927, as the master of the steamer "Olympic." The vessel left Seattle that day at 4:32 o'clock. I have a clock in the pilot-house and navigate according to the same. At 4:32 of that day it was getting dusk. It was dusk. We had our lights on. The vessel proceeded to Four Mile Rock. From Seattle to Four Mile Rock I was not in charge but after passing Four Mile Rock I took charge of the vessel. [67] We passed West Point light at 5:01. There was a strong northwest wind blowing, and it was getting dark at the time, and it was cloudy. The sea was very rough. The tide was ebbing, running out against the wind. There were quite a few white caps and quite a spray running. It was very dark. You could see light but you could not see anything else. It was overcast and cloudy. You could see the highlands but you could

(Testimony of Louis Van Bogaert.)

not see the shorelands on either side. After rounding West Point I was standing on the starboard side in the wheel-house, looking out, not through a window. The window was down. I remained there until I saw an object ahead of me about four miles northwest of West Point. I saw a dark object about one hundred feet ahead of us. I could not make out what it was. I *though* it would be a dolphin adrift or something like that. At that time it would not seem to have any motion in the water. As we struck the object I saw it was a boat. I did not see any light on this object until after we struck it. I saw a red light on the port side after it swung around under the port bow. I saw no other lights ahead of me after I came around West Point, except Point Monroe. (Witness indicates Point Monroe on chart, Defendant's Exhibit 11.) I had run nineteen minutes from West Point when I came into collision with this object. The vessel's speed was 13.8 miles per hour or 12 knots. The vessel was on her regular course. From West Point we were proceeding for President Point. I was laying a course for President Point, and from there to Apple Tree and on to No Point, and up to Port Townsend. (Witness then lays off course of "Olympic" on chart by line marked "C–D," and also lays off course on chart indicating course of a vessel proceeding from Lake Washington Canal to Suquamish as "A–B," Defendant's Exhibit 11.) My vessel was pursuing the [68] course of "C–D." When we came into collision with this object we were not in the line

(Testimony of Louis Van Bogaert.)

of intersection of a course of a vessel proceeding from Shilshole Bay or the entrance of the Lake Washington ship canal to Suquamish. We were at least two miles past that point. We struck this object in the water at 5:20. We had the clock right there and when anything happened we take the time right away because it is very important to record the time. Between the time when I first saw this object and the time when we struck it I reversed the engine. I could tell that the engine was put astern by the vibration. That was about one hundred feet from this object. Mr. Seatter, the quartermaster was in the wheel-house with me. I was not quite able to stop the vessel before striking the object but the headway was checked considerably. We struck this object on the port quarter. We got real close to it. I could see it was a boat and I hit her on the port quarter. Both were going the same way and approximately in the same direction when we hit. He was proceeding on the starboard bow, just about ahead. He was heading the same way that we were going. He was going right into the sea. When the small boat had moved away it swung on our port side and it went away one hundred feet, and I put a searchlight on it as soon as it got by our guard. I could not see him at first, and then he got away from us and the quartermaster, Seatter, kept the searchlight on the boat all the time. Then, when the boat got away one hundred and fifty feet or two hundred feet a man came out on the deck and hollered something to me, and I could not make out

(Testimony of Louis Van Bogaert.)

what he was hollering, and then he threw a piece of board about two feet square into the water and jumped after that, and his boat was still having motion ahead when he jumped. The "Olympic" was stopped and I ordered a lifeboat to go over to [69] rescue this man. It was about five minutes until he was picked up. He was brought aboard and given first aid in my room. His boat had not actually swung when he was picked up. I cannot say how far away his boat was then because we kept the searchlight on the man all the time, but the rays of the searchlight showed on the boat and the boat had not sunk yet when we picked him up. The man's watch and money were given to me and they were returned to him that evening, after the man was dried. I took care of the pocketbook and dried it. The only thing I asked Mr. Nelson was why he did not have the proper lights up, and he told me that he did not have his range light. Range light and stern light are the same thing. He said that the mast had been repaired and taken down in some manner and he had not had time to put up this mast. He was figuring on putting it up the next morning over in Poulsbo, and I said to him, "You should have put up some kind of light." And he said he tried to put up some kind of light off the dolphin of Ballard but it was too rough to put up a light and I asked him if he had seen us at any time, and he said "No" that he did not see us approaching. He did not say what dolphin it was where he tried to put up the mast. This conversation took place in

(Testimony of Louis Van Bogaert.)

my room on the way to Port Townsend. At the point of collision it was very cloudy. Quite a heavy sea was running there because we had quite a time to maneuver around. I could not see unlighted objects in the water that evening. About all that I could do was to see about one hundred feet ahead. And I was looking right ahead at the time. The visibility was bad. There was no precipitation. There were a few clouds overhead. This was about ten miles north of the Colman Dock. It would be seven or eight miles on a direct line. This man made no complaint to me about being injured. But we had [70] a lot of trouble to keep the man on our ship. As soon as we hoisted him up on deck he wanted to jump out and we had quite a lot of trouble keeping him in. In fact, before the lifeboat was hoisted on deck he jumped out before it was brought on board the deck.

(At this point Defendant's Exhibit 11, being a chart, was admitted in evidence.)

Cross-examination.

On cross-examination the witness testified as follows:

When we left Seattle I would not call it dark. It was dusk. We had to turn our lights on at four o'clock that day at the Colman Dock. The cabin lights were on at that time. Plaintiff's Exhibit 2 is a good picture of the "Olympic." I should judge it is about twenty-five feet from the bow to the front windows of the cabin. The saloon deck, or outside

(Testimony of Louis Van Bogaert.)

deck, is about fifteen feet above the water. The saloon deck, or passenger deck, as we call it. The next deck is eight feet higher. That is the boat deck. The floor of the pilot-house is about four feet above the boat deck. That would be approximately twenty-seven feet above the water. I did not sound any whistle signal. I am not supposed to give any blasts of the signal unless I know what to do. I did not put my wheel from one side to the other. This object might have been a long dolphin with piles sticking out and I could not do that for fear of running into that. You see, they have old dolphins in some of these ferry slips on the Sound, and they break loose, and the piles will hang out behind the dolphin, and if you should swing your ship on those submerged parts, your propeller would be broken. I immediately stopped and reversed. We never stopped. We just put her in reverse. I did not give a blast of the signal then because I could not make out [71] what the object was. The curtains on the cabin windows are generally put down at Seattle when we leave the dock. They were dropped down at Seattle but they were not fastened on that night. I heard the testimony of Mr. Garvey, that he was fastening the curtains then because I told him to fasten the curtains, to fasten them good. I gave him that order about 5:15. I was then in the pilot-house. I had a helmsman in the pilot-house with me. Garvey had been on lookout. I gave him an order to fasten the curtains because they generally flop around when the wind is hitting them. Sometimes the curtains are fas-

(Testimony of Louis Van Bogaert.)

tened when they are put down and sometimes they are not. If we have no wind we do not fasten them. We just drop them down because there is a big iron pipe that holds them down. I ordered him to leave the lookout and go fasten the curtains. His station as lookout is not in the eyes of the vessel because he could not walk across the bow. His place of lookout was forward of the windows on the bow. I don't know whether he was fastening the curtains for four or five minutes. I did not time him on that. I know the distinction between the weather being overcast and cloudy and being clear. I testified before the local inspectors that the weather was clear, but that is as regards fog and snow. The Local Steamboat Inspector's question had reference as to whether there was fog or snow. I haven't changed my testimony at all. If you would ask me if it was foggy and smoky I would answer that it was clear, but there was no clouds in the sky mentioned at all at the investigation before the inspectors. The question was asked me before the inspectors, "What was the condition of the weather before the collision," and I answered "a strong northwest wind and ebb tide," and "was it clear" was asked me, and I answered "Yes, sir, it was clear." That was with respect to fog and snow, [72] because Captain Ames was wanting to know whether I was running full speed or not, and I told him that I was. I would not say that they asked me directly about fog and snow, but that was what we had reference to in the Inspector's Office, as to the condition of the weather, and it had not

(Testimony of Louis Van Bogaert.)

any reference at all as to what the sky was overhead. What I wish to convey is that it was cloudy but that there was no fog or snow. We were an overtaking vessel. There was nobody on lookout at the time except Mr. Garvey. I did not observe the moon.

Redirect Examination.

On redirect examination the witness testified as follows: It is my testimony to-day that it was clear, and also was overcast, clear but cloudy. What we had reference to when we spoke of clear weather is with regard to fog or snow. If anybody comes into the pilot-house and asks you "how was the night last night," you would say, "Why, it was clear last night," but it refers to fog, rain or snow. It would mean that the visibility would be clear so far as seeing ahead was concerned. It is my recollection that it was clear at the time. I know that the curtains were down in the cabin windows before we got to West Point. I saw them in Seattle. They were down before we backed out. They have an iron bar, a weight on the bottom of them to hold them down. My instructions to the lookout before the collision were just to fasten them at the bottom to keep them from hitting against the house on account of the wind that was blowing. From my position in the pilot-house I had a clear and unobstructed view ahead, a very good view.

At this point court was adjourned until 1:30 of the same day, at which time the following proceedings took place: [73]

(Testimony of Louis Van Bogaert.)

Recross-examination of LOUIS VAN BOGAERT.

I would say the ship had between forty and fifty passengers. I do not have an actual count.

Redirect Examination.

I do not keep a list of the passengers. I have no records of the passengers. We just take the tickets at the plank and that is all.

TESTIMONY OF WILLIAM SEATTER, FOR DEFENDANT (RECALLED).

WILLIAM SEATTER, witness called on behalf of the defendant, recalled, and testified as follows:

Q. I will ask you if you did not testify as follows, Mr. Seatter, at the former trial:

"Now, just describe the maneuvers the 'Olympic' made after this gas boat had pulled off the left-hand side, as you say? A. Well, the captain gave orders to put a searchlight on this object, which I did, and I held it on there all the time. Q. Where was the searchlight? A. Right upon the pilot-house. Q. Was it inside or outside? A. The switch is inside the pilot-house and the searchlight is outside. Q. How is it controlled—from the inside or the outside? A. From the inside. Q. The control of the searchlight is inside and the searchlight is outside? A. Yes, sir. The captain turned the light on, and I operated it. Q. He turned it on? A. Yes, sir. Q. What did you have to do with the searchlight? A. You have got to turn it up and down and work it so as to show on this object

(Testimony of William Seatter.)

that we hit. Q. Was the vessel stopped when you had the searchlight turned on? A. Yes, sir. Q. Could you then see this little boat without a searchlight? A. No, sir. Q. Were you able to see where it was? A. No, sir; I could not see it without the searchlight. Q. Were you able to find it [74] with the searchlight? A. Yes, sir. Q. Where was it with reference to your ship? A. Well, it was—I cannot say exactly how far it was away. Q. Was it astern of you or on your port beam, or where? A. On the port beam, sir."

I will ask you whether or not you testified in that fashion at the former hearing, Mr. Seatter?

A. Well, it seems to me that I did, but under the condition that I am in, now, I don't remember whether I operated the searchlight or not.

Q. You don't remember now whether you did or not? A. I don't remember now.

The COURT.—He did so testify, whether he remembers it now or not, and you have read it to the jury, and that is all there is to that. You can now ask him how he accounts for the difference between his testimony at that time and now.

Mr. BRONSON.—He says he does not remember now.

The COURT.—He says that he does not remember what he testified to at the former trial. You have read to him what he testified to from a written document, and now you are going to put yourself to the trouble of denying it.

Mr. BRONSON.—That is not my purpose at all. I would like to have the witness step down and call

(Testimony of William Seatter.)

Mr. Lescher, the Court Reporter who reported that case.

The COURT.—The Court will not permit you to do that. The Court has told you that you have the evidence settled in the bill of exceptions. Suppose the stenographer denies it?

Mr. BRONSON.—Well, if the stenographer denies it, why that is the fact.

The COURT.—Well, it is in the settled bill of exceptions. What more do you want than that? You have got [75] it in the bill of exceptions.

Mr. BRONSON.—At this time we offer the bill of exceptions in evidence.

The COURT.—Oh, no. You can proceed as I told you. You have stated to the jury what he did testify at the former trial. Now, you can ask him if he can explain it. He testifies one way here and he has testified in another way at the former trial, and how is the jury going to know which way it is?

Q. Can you explain why you testify one way now and testified another way at a former trial?

A. No, sir; I cannot.

Q. You cannot explain it?

A. Not in the condition that I am in.

Q. Do you know whether or not you did testify one way at the former trial and—

A. (Interrupting.) Well, if I testified only a few days afterwards, I can remember for a few days, but two or three years afterwards, I cannot remember.

Q. You have no recollection of having testified in the manner that I have just indicated in reading these questions and answers to you?

(Testimony of William Seatter.)

A. Well, it seems to me that I did.

Q. Well, do you know whether or not those are facts that you states there—whether those are the facts?

A. Yes, sir; those are facts that I stated there. Of course, take it for two years—

Cross-examination.

Thereupon, upon cross-examination the further proceedings were had: [76]

Q. As you have said this morning, you have been in that condition all your life? A. Yes, sir.

Q. You memory is no better now than it was on the day that you testified in this court formerly?

A. Sometimes I feel all right, and other times I do not.

Q. As a matter of fact, you do not remember anything for more than two or three days, do you?

A. Well, sometimes for a week or ten days, but when it comes to two or three years, then I do not remember.

Q. You have difficulty in remembering anything after a week or ten days, don't you?

A. Yes, sir, and sometimes not that long, and sometimes it may be longer than that.

Mr. MARTIN.—That is all.

The COURT.—Just a moment. The other trial was when?

Mr. BRONSON.—Two years after the accident, approximately?

Mr. MARTIN.—Yes, your Honor.

(Testimony of William Seatter.)

The COURT.—And this is a year and a half since then?

Mr. MARTIN.—Yes, sir.

The COURT.—Now, you are trying to tell us the truth as near as you can?

The WITNESS.—Yes, sir.

The COURT.—Now, you have told us of your affliction and it does appear in the record of the former trial that you operated the searchlight, and at this time you say that you did not operate the searchlight, or that you do not remember. Now, are you able to tell us from your recollection which one of those statements is the truth, or are you still at sea about it? [77]

The WITNESS.—Well, I recollect that I did. It is coming back to me.

Thereupon the defendant rested its case.

TESTIMONY OF LYDIA KNAAK, FOR PLAINTIFF (IN REBUTTAL).

Thereupon, in rebuttal, LYDIA KNAAK, produced as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

I am a stenographer employed as a reporter for the steamboat inspectors of this port. On December 6, 1927, I took a shorthand account of the interrogation of the officers of the steamship "Olympic."

Thereupon the following proceeds were had:

Q. "What was the condition of the weather at the time of the collision?

(Testimony of Lydia Knaak.)

A. Strong northwest wind and ebb tide." Did he make that answer?

A. (Interrupting.) I cannot remember it offhand. I can verify it by looking at my notes.

Q. Please verify it. This is preliminary to what follows. It is the third or fourth question from the beginning of his examination.

The COURT.—As a matter of fact, I do not know what the witness denied, or even what you are talking about. I do not know whether the witness denied it or not.

Mr. MARTIN.—Yes, your Honor. I do not mean to contradict your Honor, but—

The COURT.—(Interrupting.) He said, "Yes, I so testified, but I had in mind the absence of fog and snow."

Mr. MARTIN.—He said that that was in the question: that they put that question to him.

The WITNESS: The question is, "What was the condition of the weather at the time of the collision," and the answer is "strong northwest wind and ebb tide." [78]

Q. And then this next question, "Was it clear?" And his answer, "Yes, it was clear."

A. Yes, sir.

Q. Do you find in any of those questions any reference to fog or snow?

A. Not in either one of those.

Q. Will you look and see, in connection with that examination, going on a few more questions, whether there was any such reference—

Mr. BRONSON.—(Interrupting.) I do not

(Testimony of Lydia Knaak.)

think that this is a contradiction of anything, your Honor. The witness testified that he did so testify.

The COURT.—That is true, but the question is, was anything said about fog and snow right then which might have some bearing as to the inferences intended by the questions with respect to the weather. Do you find anything of that sort there?

The WITNESS.—That is all that was said about the weather.

Mr. MARTIN.—That is all.

Mr. BRONSON.—No questions.

TESTIMONY OF HANS NELSON, IN HIS OWN BEHALF (RECALLED IN REBUTTAL).

HANS NELSON, the plaintiff, recalled as a witness in his own behalf, testified as follows:

After the collision I was taken aboard the "Olympic." They took my money to the captain's room I had some conversation with the captain and the mate. I never stated to them that I was not injured. I did not say that just before the collision I was having any trouble with the engine or lighting system. I did not tell them that I did not have any light aft, for the [79] reason that I thought that I would put one up at the buoy, and it was too rough and I couldn't put up the light aft. No such conversation took place. After the collision no searchlight from the "Olympic" was played on either myself or my boat.

(Testimony of Hans Nelson.)

Thereupon, in response to questions put to him by the Court, the witness testified as follows:

I had a light in the bow, six feet above the water, and I had a light aft just above the same, or five feet above the water. I put that on all the lights when I left the Locks at Ballard that day. I put all the lights up that day. The light was hanging on the sill, right up in the door. Hanging on the sill there is a cross-beam across the door frame. It was hanging on the extension cord from the battery. There was a hook up there that we use to hang the light on, on that hook all the time, and that light with a bulb hanging down came about two inches from the beam. The cord was six feet from the battery. The bulb was just hanging under the hook.

Thereafter, in response to question by counsel for plaintiff, plaintiff further testified:

My watch stopped at 5:15. It was full of water. It was all rusted up when I got home. That is the same watch I was claiming damages for. It did not go down with the vessel. The light was two inches below the sill to which it was hanging. Two inches on the inside. If it had been moved out two inches it would be right in the same as the pilot-house. The door was open and the light was lighted.

Cross-examination.

On cross-examination the witness testified as follows:

Q. You stated in answer to a question by the

(Testimony of Hans Nelson.)

Court what light you had aft. You did not have any light in the after part of the ship, did you? [80]

The COURT.—In the cabin, of course.

Q. Both lights were in the forward part of the ship, that is that I am getting at—at the wheel-house?

A. I never had any light in the wheel-house. I had it in the door of the wheel-house. It was not in the wheel-house.

Q. Both lights were up where the wheel-house is, of the vessel? A. No.

Recross-examination.

On recross-examination the witness testified as follows:

I had the window open in the pilot-house on the lee side, the second window from aft. There are five windows in the house, and the second window from aft was open. I had a light in the forecastle of the boat. The light in the pilot-house and the one down below in the forecastle did not bother me to see ahead of the vessel. The door is three feet wide. The light was in the middle of the door.

TESTIMONY OF HARRY S. REDPATH, FOR PLAINTIFF (IN REBUTTAL).

HARRY S. REDPATH, called as a witness on behalf of plaintiff, in rebuttal, having been first duly sworn, testified as follows:

My name is Harry S. Redpath. I live in Seattle,

(Testimony of Harry S. Redpath.)

and I am associated with the counsel for plaintiff in the practice of law in the Colman Building. Two or three days before the former trial I went down with Mr. Martin to the Colman Dock and we interviewed Mr. Garvey, the witness previously called here. He said that you could see the "Magna" without the aid of artificial light when the "Olympic" backed away; that the "Olympic" backed away about half a mile, and that you could see her about a half a mile out in the water without an artificial light. [81]

Thereupon the testimony was closed.

Thereupon Mr. Bronson, attorney for the defendant moved the Court to instruct the jury to return a verdict for defendant, which motion was by the Court denied, and an exception claimed.

Thereupon the following proceedings were had:

Mr. BRONSON.—If the Court please, at this time I wish to renew the motion which I made at the close of the plaintiff's case, for the reasons there stated, and also for the reasons stated in the trial brief which has been submitted.

The COURT.—The motion will be denied. The case will go to the jury.

Mr. BRONSON.—Note an exception.

Thereupon the Court proceeded to instruct the jury as follows:

INSTRUCTIONS OF THE COURT TO THE JURY.

The COURT.—Well, Ladies and Gentlemen of the Jury, you have heard the evidence, and the argu-

ments, and now it is for the Court to deliver to you the instructions. That is mainly to make you acquainted with the law that applies to the case, and in the light of which you determine the facts. Remember, you take the law from the Court, but what witnesses to believe, how far, and what weight to give to their testimony, and to the circumstances that surround the whole case, that is esclusively your function. Jurors are brought into court to determine questions of fact in the light of the law as the court gives it. This case as the Court commented once or twice during the trial, is after all, fairly simple. It resolves itself into one or two plain, distinct questions, and there is not a great deal of law involved so far as is necessary to give it to the jury. As a matter [82] of fact, the Court agrees with the statement of counsel for the defense in his argument that if the plaintiff had that light in the doorway of his boat, lit long enough before the collision so that it could have been seen by a proper lookout on the "Olympic," they would have avoided him, and the collision would have never occurred. And if the plaintiff had it there, as he says that he did, and which the defendant denies, there is no reason why he should not recover in this action.

Before we come to any more of the law, I am simply stating that I agree with counsel's position, and I think the plaintiff does now, too. That is all I can see in this case. You must remember this, that the plaintiff must prove his case by a greater weight of the evidence. The burden is on him throughout to prove that he had that light there, lit there for the length of time that I have

stated to you, and to prove that it was a good and sufficient light to serve its purpose, and to prove the amount of his damages. The burden is on him to prove all those things before he can recover. So you see that in this case, there is mainly involved the credibility of witnesses where there is a direct conflict between the witnesses for the plaintiff and the witnesses for the defendant.

You are to determine which witnesses to believe; what weight to give to their testimony, and the weight to be given to circumstances in the case.

You determine the credibility of witnesses in court just as you determine the credibility of people with whom you deal in your daily life. I have no doubt that you all take some pride in your knowledge of human nature; and in your experience in bargaining or talking with other people, that you are able to penetrate whether they are dealing fairly and squarely, and telling [83] the truth, or not, instead of letting them put something over on you. And in just the same way as you determine the truth of those with whom you deal or converse in daily life, you determine the truthfulness of those you hear on the witness-stand. You take into consideration their appearance; their demeanor; their disposition; whether they seem to be endeavoring to lay before you a plain, unvarnished tale of what occurred, giving you the whole truth of it, no more and no less; or whether they are inclined to exaggerate or to depreciate events or circumstances, and whether their statements are reasonable or not; whether they conform to common experience—your experience—and whether the witnesses are inter-

ested in the case. Of course, that is very important in this case. The plaintiff is vitally interested of course. He has lost his boat and suffered losses in connection with it that run up into a considerable amount of money for anyone, and we can assume that if the plaintiff is a fisherman, it is rather a large sum of money.

On the other hand, the defendant's witnesses are interested—some of them. The captain of the boat is certainly interested because it is assumed that he was on watch at the time, and he is held responsible for due care and attention to his boat.

The captain says that he took the bow lookout away from hi*m* post of duty to attend to the curtains on the windows. So you can see that he is interested. If the captain is not expert or skillful or careful, he may lose his rating as a captain, and not be able to operate vessels as a captain thereafter.

The*re* there were two or three other witnesses that testified on behalf of the company, and they are still in the employ of the company. Remember, there is no rule of law that a person interested in a case as the plaintiff is, or the witnesses [84] interested in a case as the captain, mate and others of the defendant's witnesses are, will by reason of that fact testify falsely. There is no rule of law that so provides, but the rule of law is this, that you will remember the interest of the parties and of the witnesses, and you will determine whether that self-interest of theirs, taking note of the extent of from the truth in their endeavor to deceive you and it, has caused them in any particular to deviate

procure something that they are not entitled to, or to resist something that they ought to pay.

You must remember that if witnesses conflict, it is for you to determine who is telling the truth. Witnesses sometimes conflict with each other on the same side of the case. It may be due to a mistake, or to faulty recollection. No man's recollection is perfect—or otherwise. So you must take that all into consideration.

Remember in starting out in this case, too, that it is not enough that there was a collision and the plaintiff has suffered serious loss, to entitle him to a verdict. We all understand that, but it is good to remember.

The plaintiff bases his right to recover in this action on the fact that the collision was due, as he alleges, to the negligence and fault of the defendant, and the defendant alone, and the defendant resists on the theory, as it alleges, that it was not negligent and at fault at all, but that the plaintiff himself is the guilty person, by reason of not conforming to the rules with respect to his lights.

Nor are you to be moved by sympathy for the plaintiff because of his loss, or by sympathy for any party. And certainly you are not to be moved by prejudice. Sympathy and prejudice are both enemies of justice, because they affect your ability to [85] judge honestly and justly. If you are moved by sympathy or prejudice, you are moved by your emotions, rather than by your reasoning. So dismiss all sympathy and prejudice from the case.

You are not entitled to consider that the plain-

tiff may be poor. There is no evidence here, in his station of life, which would seem to spell very much wealth; nor are you to be moved by the fact that the defendant is a corporation and may be wealthy, because justice does not take note of those conditions. It provides compensation for one injured, as in this case, not because he has lost something; not because the defendant may be able to pay, but, if at all, because he was injured by the fault of the defendant. A jury, or any of us, are entitled to go down into our own pockets out of sympathy, to assist anybody, but neither you nor I are entitled to go down into the pockets of the defendant simply because the plaintiff has lost something, unless you can form an honest judgment that the defendant is at fault, as will be a little later explained to you.

Now, Lady and Gentlemen of the Jury, what is involved in this case is nothing more nor less than the law of the road at sea. Ships running on the ocean have their lanes to travel—their roads to travel, and laws are provided to govern their maneuvers and their safety, and that is what is involved here. Among those laws is one which requires that every vessel shall carry certain lights. We will deal with that first. And, I might say, that law is as binding on the plaintiff as upon the defendant, if those lights are at fault.

The law with respect to the plaintiff's boat requires that it shall be equipped as follows, "From sunset to sunrise,"—that means from the ideal or astronomical sunset, when *the* the sun goes below water level or the plain surface where you can see it going down—"From sunset to sunrise," a boat

like the [86] plaintiff's must have a bright, white light in the front of the ship, as near the stem as practicable, so constructed as to throw its light forward and on the sides until the range of vision is two points, in compass vernacular, abaft the beam. That is, back of the middle of the ship. Most of you know what the nautical terms are better than I do. I may get them mixed up, myself. We are not interested in that light. Well, I will not say so, either, because the defendant insists—it maintains that the plaintiff had no light at all except a red light that showed after the collision when the boat turned. Anyhow, that is part of the lights. He must have this front light—this bow light. He must then have a white light aft. That is supposed to be beyond the middle of the ship—the beam of the ship, towards the stern—which will show all around the horizon. The stern light, mind you, will only show in front, and on each side, but this light in the rear—the aft light—must show all around the horizon. Then on the starboard side, he must have a green light, which shows a certain distance on each side forward, and towards the rear as the boat proceeds, and on the port side, he must have a red light, showing likewise on the sides. You can see that those four lights, if lit, are an invaluable index to the course of the ship, and other ships seeing them, can govern their courses accordingly. If the ship, other than the one on which the lights are, would see the two white lights, it would also see one of the side lights that was there, and it would know at once which way that boat was going, and which side

was turned towards it. Or if it would see but one white light—Counsel, these red lights and green lights show forward, do they not?

Mr. MARTIN.—Yes.

Mr. BRONSON.—They show forward and to the side. [87]

The COURT.—These side lights show forward, so that if the party on the other boat would see one white light and two side lights, he would know at once that that boat was coming towards him. But if he would see nothing but one white light, then he would know inevitably that that ship was ahead of him—if he saw the rear light— and that he was pursuing the same course, and that is the object of the lights, so that other vessels may know how that vessel is maneuvering, and so that they can manoeuver accordingly.

Now, the law is further that the following vessel, in the situation of the "Olympic" here, has to look out for and see that it does not overtake and collide with the vessel ahead of it, providing that that vessel is carrying the proper lights, and their lights are visible. The following vessel, as the "Olympic" in this case, is responsible that it does not overtake and collide with the vessel ahead that has the proper lights.

The vessel following, as the "Olympic" in this case, has the right to assume that any vessel has proper lights, but that does not absolve it, of course, from looking out. It must be watching for it. It is not enough to have lights. It must have a lookout, so that it can see that *is* is there.

Now, in this case, the "Olympic" had no lookout

to comply with the law. The law says that the lookout must be placed at the best available point, to see what he is looking for, and in the bow of the vessel or as near thereto as is practicable. He must give his undivided duty to looking out and seeing what is in the lanes of traffic. He must be there as a lookout and not for any other purpose. Of course, the evidence is this case is that the lookout was fixing curtains for four or five minutes before the collision. He was not lookout at all within the law. [88]

Up in the pilot-house of the "Olympic"—the defendant's vessel, was the captain, according to the testimony, and the helmsman Seattor. You have heard Seattor's testimony, and I, too, do not think that there is much confidence to be placed in any part of his testimony. The question is whether it is very material. His testimony is that he cannot remember; that he may remember one time and not another, and he was hard put to it before he could remember as to what he testified at the other trial, and it comes back to him now that there was a searchlight that was played on the other boat. I do not think that that is very material, except that it might show the darkness at the time. Furthermore, he thinks that he looked out shortly before the collision, and he did not see the boat.

The captain was there, and his duty was to navigate the vessel and see that it was kept on its course, as he outlined it, but he is not a satisfactory lookout to come within the provisions of the law requiring a lookout to be kept, as I have defined it to you. And, again, that is the attitude of counsel for the

plaintiff, when he says there is only one question in this case, and I agree with him, whether the aft light on this vessel of the fisherman was there.

Now, you have heard the testimony of the plaintiff. He tells you that he had started out from a point at the mouth of the canal, I think, and was proceeding in his motor-boat north, northwest. That he left at a certain time; that he had his lights on. That it was not dark yet, but he had taken down some time before his aft light—his mast light and that his aft light, or light that he calls his aft light, was a light that hung in the cabin door of the pilot-house; that it hung by a cord, he said, two inches below the top of the door frame, a door I think about three feet wide he said; that it was open, and he was in [89] there navigating his vessel north, northwest, the same course as the defendant's vessel was going when it overtook him. He testified that he had placed those lights on some little time before—that he had put them all up that day—these four lights. He does not testify that he never had them on before, but he says that he put them on at the time that he started out. This was a 6-watt light that he testified that he had.

Mr. MARTIN.—A 6-volt light.

The COURT.—What is that?

Mr. MARTIN.—A 6-volt light.

The COURT.—A 6-volt light?

Mr. MARTIN.—Yes.

The COURT.—And he says that it was lit, as were his other lights, when he started out and all the time thereafter. This light, as he was in the pilot-house directing his vessel, would be behind him.

Argument is made by the defendant against the probability and reasonableness of that light being lit, because it would interfere with the navigation of the vessel, it says, and you are cited to the fact that if you have your dash lights unscreened so that they throw their rays upon your face, you find it difficult to navigate your auto. Perhaps all of you are familiar with the situation when you are in a lighted room, looking out into a dark night —the effect of that. That is for you to consider. The argument is legitimate, and it is for you to give such weight to it, in determining the truthfulness of the plaintiff that he had that light lit, as in your judgment you think it is entitled.

The plaintiff was not obliged to keep any lookout behind him, because if he had his lights lit, he was entitled to presume that any vessel following him would take note of him [90] and would comply with the law and not run him down.

The defendant's witnesses tell you that they did not see any such light. I think only one witness for the defendant has testified to being on the lookout at that particular time, and that is the captain—Captain Van Bogaert, I think his name is. He says that he was looking forward just before the collision; that he saw a dark object on the water which turned out to be this boat; that he saw it about 100 feet distant, but it had no lights visible at all on it, and only after it had collided with him and there had been some backing, and the plaintiff's boat was turned around, did he see a light, and that was a red light on plaintiff's boat and no other. Whaley also testified to that.

On the other hand, there are two witnesses for the plaintiff who testified to seeing the light shortly after the collision occurred. Mrs. Schuman, now deceased, whose testimony was read to you, testified that she was eating when she felt the vibration of the reversing; that she sat still for quite a while, and hearing more commotion, she went to the window and saw a boat and saw a light on top of the vessel. She does not say whether that was a light in the cabin door, or at the bow of the vessel. She said she saw it on top of the vessel. That was her testimony, and Mr. Schuman testified that he came out some time after the collision—you remember the time—of course the intervals, perhaps, were not very long, any of them—and that after the "Olympic" had backed so that it was in the rear of plaintiff's boat, he saw this white light burning in the cabin door. The defendant's witnesses say that there was no light except the red light when the plaintiff was turned around.

Now, Lady and Gentlemen of the Jury, the law is, with respect to this light, that if it is not in the place and the kind of a light which the law requires it to be, if a collision [91] occurs, it imposes the burden upon the plaintiff to satisfy you that the light differing from the light established by law could not have been any part of the cause of the collision. That it did not contribute to the collision. That burden is on the plaintiff. If that was his aft light, and there is no reason why it could not have been, even though it was not across the dividing line in the middle of the ship—between the bow and the stern—if that was his aft

light, and it was the only aft light that he had, if it was not so placed that it could be seen all around the horizon. It could be seen from behind, but it could not be seen from either side, because it was within the frame two inches, and, of course, it could not be seen from the front. But you must remember, too, that the law is a practical thing, and it does not require any useless thing. If that light served the purpose of an aft light to a following vessel, it was altogether immaterial whether it would show from the sides or show from ahead, so far as that vessel is concerned, but provided it was sufficient to serve the purpose of an aft light for the following vessel, and could not at all have misled it or have contributed to the collision which happened. I myself cannot reason out, and I think counsel has taken that attitude—I cannot reason out why, if that light was there, lit, and no obstruction in plaintiff's rear, and plaintiff testifies that there was none—I cannot understand why it would not serve just as well for the following vessel as if it could be seen from either side and ahead. If you can, why that is your privilege, for you to finally determine this. So it comes right down to that question—the attitude taken by the plaintiff's counsel in his argument, and the court takes it as a matter of law.

You have two questions to decide in this case, outside of the damage, and you must decide them both in the affirmative [92] before you can find for the plaintiff. First, it is proven by the greater weight of the evidence that Nelson's light in his cabin door was where he testified that it was; that

it was of the kind that he testified it was, and lit sufficiently long before the collision so that it could have been seen by the defendant's lookout, had he been exercising his function properly and in time so that the collision might have been avoided. If you answer that that is proven by the greater weight of the evidence, then you proceed to the next question. If you do not find that the greater weight of the evidence proves that in Nelson's favor, that ends the case. Of course, if he did not have that light lit, and lit sufficiently long so that a watchful lookout on the defendant's vessel could have seen it in time to avoid him; why he has no right to any recovery here, because he was negligent. In that case, he violated the law, and I do not care whether it was five o'clock or five-twenty, or whether it was more or less dark, it is inevitable that the absence of his light, if it was absent, would have contributed something to the collision that followed. He is out of the case and out of court right there, unless you find by the greater weight of the evidence that his light was there, as he tells you, with that degree of sufficiency—a 6-volt light—and lit long enough to have been seen and avoided by the defendant's vessel, had it a watchful lookout at the time.

If, however, you find that in favor of the plaintiff, then the next question is, in its position there in the door, if you find it was there and lit—not visible ahead and not visible on the sides—did it have anything to do with or is it clear to you that it contributed nothing to the collision that followed? Here is a vessel coming from behind—the defend-

ant's vessel. If that light had been visible on the sides and [93] ahead, would it have better enabled the defendant's vessel aft to avoid him and to see him and avoid him? I do not think so, and counsel's attitude for the plaintiff in his argument likewise was the same. That is common sense. If the light was there, and visible from the defendant's vessel, had it a watchful lookout, as counsel said fairly in his argument, if it was there long enough, it would have enabled the defendant to avoid the collision.

So, if you answer those two questions in the affirmative, proven by the greater weight of the evidence, favorable to the plaintiff, then there is only one more question, and that is, how much was the damage? And that brings you to a consideration of the value of the boat at that time; of its fittings and accessories and supplies on board, and what was its reasonable market value at that time. That would be the amount that you would award to him in any event.

Then he has another cause of action for his personal damages which he alleges were inflicted upon him by the collision, scratching his leg. He says that the collision threw him down against his engine, and scratched his leg, and that he was laid up for some time afterward, and he says that he feels sick now on that account. You have heard his testimony. The defendant disputes it. The employees of the defendant company say that he was not injured at all and that he told them so on board the boat. They say that he did, and he testifies that he did not, and they say that he is

entitled to nothing. But if you find that he has been injured by the fault of the defendant as I have heretofore defined it to you—if you answer the two questions that I first put to you in favor of the plaintiff, then he is at least [94] entitled to something for having his personal rights invaded by being thrown into the water. The defendant argues that he jumped in, but you must remember that the plaintiff was confronted at that time by an emergency, and if he was put into that condition and situation by the fault of the defendant, then the fact that he may not have acted with the best judgment does not relieve the defendant from compensating him for any injury that he may have suffered. When one person puts another person in a place of imminent peril, that other person is not bound to exercise the best judgment to get away. His judgment may be poor, and in consequence he may be more injured, but still the party putting him in that situation is liable to him later.

That is the case before you. It simmers down to this, Lady and Gentlemen of the Jury, that taking into consideration all of the evidence in the case, both for the plaintiff and the defendant, and the circumstances, if you find by the greater weight of the evidence that the plaintiff had, as he testified to you, a light in the door of his pilothouse, facing the rear, of 6-volt size, as he tells you, and burning long enough before the collision so that a watchful lookout on defendant's vessel could have seen it, and so could have avoided the collision, he is entitled to recover. If you do not

find that by the greater weight of the evidence, he is not entitled to recover.

When you retire to the jury-room, you will select one of your number as foreman, and you will proceed to your verdict. It takes twelve to agree on a verdict. Any exceptions?

Mr. MARTIN.—May I suggest that I have such a doubt in my own mind, that I do not want any reference that I may have made as to the official log to be considered by the jury, and I will ask your Honor to so instruct. [95]

The COURT.—Well, Lady and Gentlemen of the Jury, counsel, whether he is right or wrong about the law, he says now that he wants you instructed not to consider anything about that log. Forget all about it. Dismiss all that from your mind. Do not attach any weight because of its absence against this defendant. So remember that. So dismiss that entirely from your mind—everything that has been said to you about the log. Are there any exceptions for the defendant?

Mr. BRONSON.—I wish to note an exception to the failure of the court to give each one of the requested instructions which we have submitted in writing, and I also wish to except to the instructions which were given as I have taken them down the best I could as your Honor gave them to the jury.

The COURT.—Well, what are they, Counsel?

Mr. BRONSON.—I wish to except to your Honor's instruction as follows, referring to this light in the pilot-house, that if he had it there, as

he claims, there is no reason why he should not recover.

Again, I wish to except to the instruction given that the defendant relies on the contention that it was not negligent at all. That is not our contention, your Honor.

The COURT.—Well, just state it. If I am in error, I will correct it.

Mr. BRONSON.—Our contention is that whether or not there was negligence on the part of the defendant, or defendant's lookout, if there was any negligence—that coupled with any negligence on the part of the plaintiff is sufficient to find in defendant's favor.

The COURT.—I told that to the jury. That is true. I thought I made that plain to the jury by stating that the whole question depended upon whether or not he had his light lit. [96] If the plaintiff did not have his light there, as he testified, lit as I have stated it to you—there was not any negligence on the part of the defendant, as a matter of fact, because if the plaintiff was negligent by not having that light, why his negligence did undoubtedly contribute to the collision, and the defendant would not be liable then at all. But the defendant's attitude is that even if it were guilty of some negligence at the time, the plaintiff was also negligent, and hence he is not entitled to recover. That question, then, comes to the question of light. If the light was not there, of course the plaintiff was negligent even though the defendant was negligent, if the plaintiff was negligent, too, why the defendant is entitled to a verdict.

Mr. BRONSON.—So that I may be fair with the court and make my position clear, my objection does not go alone to whether he had such a light there but whether or not it was visible and whether or not it could be seen. We are not relying on the fact whether he had the light or did not have it, but the question which I think should be submitted to the jury is whether or not he had the light which the law requires, and that the court, in instructing the jury—

The COURT.—(Interrupting.) I will tell them right now that he did not. I told them so, that he did not have the light that the law requires. The law requires a light that is visible all around the horizon. Proceed.

Mr. BRONSON.—I will limit myself to the specific instruction, that the defendant claims that he had no light. That is what you instructed them.

The COURT.—What is that?

Mr. BRONSON.—You instructed them that the defendant claimed that he had no light. That is not our contention. We do not deny that he had the side lights and the light showing forward, [97]

The COURT.—That does not cut any figure in the case. The defendant does not contend that he did not have his bow light and side lights. They are not disputing but what he had the side lights and the bow light.

Mr. BRONSON.—I think that we are entitled to except also, your Honor, to the instruction with reference to the corroboration by the Schumans. As pointed out, the Schumans did not profess to

see any light on the vessel before the collision, and lights visible after the accident have no bearing as to what was on the vessel of the plaintiff before the accident.

The COURT.—I told the jury that. Nobody, of course, professed to have seen the situation as it was at the moment of the accident, or to know just what it was, except the plaintiff himself and the captain of the "Olympic," who says that he was on lookout at that moment. The Schumans came up several minutes after the accident occurred. Of course, a light lit then is not proof that it was lit before, because it might well be that the plaintiff could have turned his lights on after the collision, but a thing happening so recently after the collision as the Schumans coming up and seeing the light, it has to be given as much weight as in your judgment you think it is entitled to upon the point, was the light lit when the collision occurred?

Mr. MARTIN.—May I ask your Honor, in view of your Honor's instructions touching that point, and the emphasis laid upon it, that your Honor instruct the jury as to the rule between the positive and negative testimony, namely—

The COURT.—(Interrupting.) Let counsel conclude taking his exceptions.

Mr. MARTIN.—May I renew that after counsel finishes?

The COURT.—Yes.

Mr. BRONSON.—I wish to further except, your Honor, to the [98] instruction which you have, in language as accurately as I could take it down, as follows, "If you take that as a light, referring

to the light in the pilot-house, there is no reason why you should not take that to be an aft light."

The COURT.—Yes. I mean in its place, forward by the beam, as it apparently was, it served every purpose of an aft light which the law requires and names as an aft light. Your exceptions are noted, of course, as you make them.

Mr. BRONSON.—Your Honor instructed also that it was immaterial if the light could not have been seen from either side. I think that is one of the primary issues in this case.

The COURT.—It is immaterial if it could not be seen on either side, if that fact did not contribute at all to the collision that followed.

Mr. BRONSON.—The point I make is that these vessels were on courses which did not coincide, and according to the testimony of the plaintiff, the other vessel was on his quarter, so that he was looking out from behind and at the side also.

The COURT.—The captain testified that they were on the same course.

Mr. BRONSON.—He said that they appeared to be headed the same way when they were in the jaws of collision.

The COURT.—The jury will remember. As I told you, Lady and Gentlemen of the Jury, if the fact that this light would not show to the side, contributed at all—unless you are satisfied that it did not contribute to the injury, why, of course, the plaintiff is entitled to recover.

Mr. BRONSON.—Your Honor has said that there were two questions to decide, which your Honor later extended to three. That is, first, is it proven

by the greater weight that the light was where plaintiff says it was. The burden is upon the plaintiff, [99] and it goes further than that. He just prove that the failure to have the omitted light was not one of the causes of the accident. That burden is on the plaintiff, and that proof must be forthcoming. The second point your Honor made was, in its position did it do anything to contribute to the accident. I do not know what you meant by that, but I do not believe that that fulfills the requirements.

The COURT.—The Court was taking, and it supposed that it was justified in taking, your statement in your argument to the jury. In other words, if you are not maintaining the argument that you made to the jury, let the jury know it right now.

Mr. BRONSON.—Your Honor—

The COURT.—(Interrupting.) I will read that much to answer your exception. The instruction asked by the defendant, and handed up before the argument, is this, "Under the facts in this case, the failure of the 'Magna' to carry the prescribed white light aft to show all around the horizon, is a fault sufficient to fix the plaintiff with at least contributing fault for the collision between the vessels and consequent loss and damage, if any, suffered by the plaintiff, requiring you to return a verdict for the defendant, unless you shall find that the failure to carry a white light aft to show all around the horizon, by the 'Magna,' could not have been one of the causes of the collision by this defendant vessel following from behind."

Mr. BRONSON.—Just one more, your Honor, and that is with reference to the second cause of action. Your Honor will recall that there are two causes of action, and that whether or not there was negligence on either party at the time of this collision, there is still a second question as to the negligence of either or both parties following—pertaining to the second cause of action—that is the immersion in the water overboard. [100]

The COURT.—I do not get you at all.

Mr. BRONSON.—We have passed the point of collision. After that, there is still the second cause of action involved, namely, the jumping overboard; the failure to carry the life-saving equipment prescribed by law, and the negligence or lack of negligence on the part of plaintiff in jumping overboard. That affects the second cause of action where it would not the first cause of action.

The COURT.—Very well.

Mr. MARTIN.—Your Honor—

The COURT.—(Interrupting.) What is it, now?

Mr. MARTIN.—I do not think there is any dispute in the maritime law with respect to this proposition. The court has said many times that it frequently happens that there is positive testimony that lights were burning, and testimony on the other hand that they did not see the lights, and the rule is that negative testimony is not entitled to the weight of positive testimony. In this case the positive testimony is that there was a lighted light, and that is entitled therefore to the greater weight.

The COURT.—That is a question for the jury. That is something for the jury to consider in weighing the evidence. You know, Lady and Gentlemen of the Jury, that persons do not see the same thing at the same time in the same way. For instance, two people go downtown and look at a show-window, and in describing later, what they saw in that show-window, one may state, and state honestly, things that were not there at all.

Now, the law says that where two persons testify to a situation at the same time, the one who testifies positively that it was thus and so—"I saw it"—is entitled to more weight than one who says, "No, it was not that way. I didn't [101] see it."

That is the point that counsel wants to make, and it is for you to say whether it applies in this case. The plaintiff says, "I had the light there," and the captain says, "He did not have the light there, because I did not see it." Of course, that involves whether he saw it or he did not see it because it was not there.

Mr. MARTIN.—Would your Honor permit me to take an exception to your Honor's instructions—

The COURT.—(Interrupting.) You require no permission. You can take as many exceptions as you dictate into the record.

Mr. MARTIN.—I have this in mind, your Honor—

The COURT.—(Interrupting.) Take your exceptions and be through with them.

Mr. MARTIN.—I except to the instructions as given, for the reason that the matter of divided damages and the question of fault, mutual and sole,

was not mentioned in the court's instructions. The court has tried the case as one at common law with respect to contributory negligence, which is a bar to the action at common law. We take this position with respect to this, that maritime law applies in its entirety, and there should be an instruction to that feature.

The COURT.—I quite agree with you, but the Circuit Court of Appeal has said otherwise, and that is why we are having this trial.

Mr. BRONSON.—I would like to make this further exception with reference to negative and positive testimony. Negative and positive testimony have no application in this case. The testimony on behalf of the defendant is not that there was not any light in any particular place, but that it was not visible. Now, there was not any negative testimony on that. There was [102] positive testimony.

The COURT.—Lady and Gentlemen of the Jury, I will give you the pleadings in this case. You do not need to read the pleadings if you do not want to. The matter is clear enough before you as to what the question involved is. You can read them if you want to. When you retire to your jury-room, you may proceed upon your verdict. It takes twelve to decide this case.

Mr. BRONSON.—There is a rule in this state that the pleadings will not go to the jury.

The COURT.—This is the first time that I have ever heard of that.

Mr. COLLETT.—Will your Honor call attention to the jury which is the first cause of action and

which is the second cause of action? You mention them in the proposed forms of verdict.

The COURT.—The first cause of action relates to the boat and its accessories; the second cause of action relates to the personal injuries claimed by the plaintiff. You may now retire.

VERDICT.

Thereafter, on the 7th day of May, 1931, at the hour of one o'clock in the afternoon, the jury returned a verdict finding for the plaintiff on his first cause of action for the sum of Twenty-two hundred fifty ($2250.00) Dollars, and on his second cause of action in the sum of Two Hundred Fifty ($250.00) Dollars.

JUDGMENT.

Thereafter, on the 11th day of May, 1931, the following judgment was signed and entered:

The above-entitled cause having been tried to a jury in the above-entitled court on the 5th and 6th days of May, 1931, before Hon. George A. Bourquin, United States District [103] Judge, and the jury having returned a verdict for Twenty-two Hundred and Fifty Dollars ($2,250.00) on plaintiff's first cause of action, and Two Hundred and Fifty Dollars ($250.00) on plaintiff's second cause of action, now, upon motion of the plaintiff for judgment on the verdict,—

IT IS ADJUDGED AND DECREED that plaintiff have and recover Twenty-five Hundred Dollars ($2,500.00), less the sum of Three Hundred

Twelve and 5/100 Dollars ($312.05), costs duly awarded and entered in favor of defendant in the United States Circuit Court of Appeals and the Supreme Court of the United States, or the sum of Twenty-one Hundred Eighty-seven and 95/100 ($2,187.95), together with plaintiff's costs to be taxed by the Clerk, and that execution may issue for said sum of Twenty-one Hundred Eighty-seven and 95/100 Dollars ($2,187.95), plus the amount of plaintiff's costs, as finally taxed herein. Defendant's exception is hereby noted and allowed.

Done in open court this 11th day of May, 1931.

(Sgd.) GEORGE M. BOURQUIN,
United States District Judge.

Respectfully submitted,
BRONSON, JONES & BRONSON,
Attorneys for Defendant.

Copy of within proposed bill of exceptions received this 9th day of June, 1931.

MARTIN & COLLETT,
Attys. for Plaintiff.

[Lodged]: Jun. 9, 1931. [104]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

The foregoing bill of exceptions, amended, to which this certificate is attached, is hereby certified, settled and allowed as true, full and complete, and made a part of the record for appeal.

This 22 day of June, 1931.

BOURQUIN,
U. S. District Judge.

[Endorsed]: Filed Jun. 23, 1931. [105]

[Title of Court and Cause.]

PLAINTIFF'S PROPOSED AMENDMENTS TO DEFENDANT'S BILL OF EXCEPTIONS.

Plaintiff now proposes the following amendments to the defendant's bill of exceptions filed in the above cause, to wit:

That after and following line 24, page 78, of the defendant's proposed bill of exceptions, which is at the conclusion of the statement as to the verdict rendered in the above cause, the following proceedings should be noted and set forth in said bill of exceptions, to wit:

That the plaintiff prepared a form of judgment upon the verdict, and duly served the same upon defendant's attorneys on the 8th day of May, 1931, which judgment proposed by the plaintiff was in the terms as follows, to wit:

No. 20,246.

"HANS NELSON,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a Corporation,

Defendant.

JUDGMENT.

The above-entitled cause having been tried to a jury in the above-entitled court on the 5th and 6th days of May, 1931, before the Honorable George M. Bourquin, United States District Judge, and the jury having returned a verdict for $2250.00 on plaintiff's first cause of action, and $250.00 on plaintiff's second cause of action; now, upon motion of plaintiff for judgment on the verdict,—

IT IS ADJUDGED AND DECREED that plaintiff have and recover $2500.00, of and from defendant, together with his costs to be taxed by the Clerk, and execution to issue thereon for the full amount of said judgment and costs.

Done in open court this —— day of May, 1931.

_____,

United States District Judge.

Copy received this 8th day of May, 1931.

BRONSON, JONES & BRONSON,

Attorneys for Defendant."

That thereafter, on the 11th day of May, 1931, Harry S. Redpath, Esquire, of plaintiff's counsel,

moved the entry of the [106] said judgment as proposed by plaintiff; that Mr. Robert S. Bronson, of defendant's counsel, moved the entry of the judgment as proposed by himself on behalf of defendant, which the court subsequently entered as the judgment in this cause, which is set forth on pages 78 and 79 of defendant's proposed bill of exceptions. That in resisting the entry of defendant's proposed form of judgment and in urging the court to enter the judgment proposed by plaintiff, Mr. Redpath took the position that the judgment in favor of the defendant for its costs in the Circuit Court of Appeals in the sum of Three Hundred Twelve Dollars and Five Cents ($312.05) was a judgment wholly apart from the proposed judgment against the defendant for Twenty-five Hundred Dollars ($2500.00), upon the verdict. That no set-off had been pleaded in this cause, and that defendant could not legally have its judgment for costs set-off as indicated in the form of the judgment proposed by the defendant.

Thereupon the Court took the matter under advisement and subsequently entered judgment in the form and manner as proposed by the defendant for the sum of Twenty-one Hundred Eighty-seven Dollars and Ninety-five Cents (2187.95), together with plaintiff's costs to be taxed, instead of entering judgment for Twenty-five Hundred Dollars ($2500.00) as proposed by the plaintiff.

In signing the said judgment, the Court appended thereto on the face of the judgment beneath his signature the following opinion or memo randum, to wit:

"At law is power to offset judgments on motion. Orally moved here and granted." Signed Bourquin, J."

Plaintiff desires the record thus made to show that the set-off contained in the judgment as entered was upon the motion of the defendant, resisted and opposed by the plaintiff.

We respectfully submit the foregoing this 18th day of June, 1931.

WINTER S. MARTIN,
MARTIN & COLLETT,
Attorneys for Plaintiff. [107]

Copy of the foregoing proposed amendment to defts. bill of exceptions recd. and acknowledged this 18 day of June, 1931.

BRONSON, JONES & BRONSON,
Attorneys for Deft.

[Endorsed]: Filed Jun. 18, 1931.

Allowed June 22, 1931.

BOURQUIN, J. (Signed)

[Endorsed]: Filed Jun. 23, 1931. [108]

[Title of Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL.

To the Honorable GEORGE M. BOURQUIN, Under Special Assignment Judge of the Above-entitled Court:

Comes now the Puget Sound Navigation Com-

pany, a corporation, defendant, in the above-entitled preceeding, and respectfully petitions and prays the court for an order allowing the taking and prosecution to conclusion of an appeal in the above-entitled matter to the Honorable Circuit Court of Appeals of the United States, for the Ninth Circuit, from that certain judgment heretofore entered on the 11th day of May, 1931, and from each and every part thereof.

And said defendant further prays that a citation on appeal may issue according to the custom and practice of this Honorable Court, and that a transcript of record, together with bill of exceptions and other proceedings in said cause, may be prepared by the Clerk of the above-entitled court and transmitted to said Circuit Court of Appeals, all in accordance with the usual custom and practice of this Honorable Court and the law and rules in such cases made and provided, and

Said defendant further petitions and prays that this Court fix and determine the amount of cost and supersedeas bond to be forthwith submitted for approval and filed by defendant in order to perfect said appeal and effect a stay and supersedeas of said judgment.

Dated at Seattle, Washington, this 3d day of August, 1931.

BRONSON, JONES & BRONSON,
Attorneys for Defendant.

Received copy of foregoing petition for allowance this 5th day of August, 1931.

WINTER S. MARTIN.

GVC.

[Endorsed]: Filed Aug. 5, 1931. [109]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF COST AND SUPERSEDEAS BOND.

Upon the petition of the Puget Sound Navigation Company, a corporation, defendant in the above-entitled proceeding,—

IT IS HEREBY ORDERED that an appeal, pursuant to law and the rules of court may be, and the same is hereby allowed defendant, Puget Sound Navigation Company, from that certain judgment heretofore entered in this cause on the 11th day of May, 1931, to the Honorable United States Circuit Court of Appeals, for the Ninth Circuit; and

IT IS FURTHER ORDERED that the amount of cost and supersedeas bond to be forthwith filed, sufficient as to form, security and amount, be and the same is hereby fixed in the sum of Twenty-five Hundred ($2500.00) Dollars, and

IT IS FURTHER ORDERED that citation on appeal, pursuant to law and usual practice of the above-entitled court, may thereupon issue, and said appeal proceed as in other cases.

This 8th day of August, 1931.

BOURQUIN,

U. S. District Judge, by Special Assignment Trial Judge of the Above-entitled Court.

[Endorsed]: Filed Aug. 10, 1931. [110]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now Puget Sound Navigation Company, a corporation, defendant in the above proceedings, and hereby assigns as errors in the proceedings and trial of said cause, and in the rulings, orders, opinions and judgments of the above-entitled court to the manifest prejudice of the defendant, the following:

I.

The Court erred in permitting the witness, Emil Schuman, to testify as to lights observed following the collision, and as to the visibility of the M. S. "Magna" following the collision and after substantial change of bearing and positions of the two vessels, and in denying defendant's motion to strike out such testimony. (Bill of Exceptions, pages 5 to 8.)

II.

The Court erred in permitting the plaintiff, over objection, to answer the following question:

"Could anybody see that light suspended in the door of your vessel—in that open door approaching from the stern?"

(Bill of Exceptions, page 13.)

III.

The Court erred in permitting the plaintiff, over objection, to answer the following question:

"Hans, did you ever have occasion to be away from your own vessel at night-time, either on the shore or on another [111] vessel, when you could see that light suspended in the doorway of your cabin?"

(Bill of Exceptions, pages 13 and 14.)

IV.

The Court erred in permitting the plaintiff, over objection, to answer the following question:

"How far could you see that light when the light was on and when it was hanging in the doorway, suspended as it was at the time of the collision?"

(Bill of exceptions, page 14.)

V.

The Court erred in permitting the plaintiff, over objection, to answer the following question:

"Have you actually seen that light half a mile away?"

(Bill of Exceptions, page 14.)

VI.

The Court erred in permitting the plaintiff, over objection, to answer the following question:

"How far could you see any vessel ahead of you, a vessel the size of the "Magna?"

(Bill of Exceptions, page 15.)

VII.

The Court erred in overruling defendant's challenge to the sufficiency of plaintiff's evidence and the motion for nonsuit and directed verdict at the close of plaintiff's case, it then being conclusively established by the admissions of plaintiff that plaintiff had violated Article II of the Inland Pilot's Rules, promulgated by the Steamboat Inspection Service of the Department of Commerce, and also the provisions of Chapters 513, 514 and 515 of the Act of June 9th, 1910, U. S. C. A., Title 46, in that said plaintiff admittedly failed to carry, show or display upon his [112] vessel the white range light aft, elevated and unobscured, and showing around the horizon as required by said rules and said act, there being no evidence then adduced proving, tending to prove, or from which the jury were entitled to infer that such violation of the rule and statute by the plaintiff could not have been one of the causes proximately contributing to the collision and the loss, damage, injury and destruction for which plaintiff seeks recovery in said cause, and it further conclusively appearing from admissions of plaintiff with reference to plaintiff's alleged second cause of action, that plaintiff was negligent and careless in voluntarily and unnecessarily jumping overboard from his vessel and further negligent as a matter of law in failing, omitting and neglecting to have and carry on said ves-

sel, in the manner prescribed, the life saving equipment required by the Act of June 9th, 1910, U. S. C. A., Title 46, Section 515.

(Bill of Exceptions, pages 21–23.)

VIII.

The Court erred in denying defendant's motion for a directed verdict interposed at the close of all of the evidence of said cause, it then appearing, in addition to the matters set forth in the preceding assignment, number VII, by direct, positive and uncontradicted evidence that no range light or other light on plaintiff's vessel was actually visible at any time prior to the collision, in the direction of the approach of defendant's vessel, and it then being positively proven and established by uncontradicted evidence that the absence of such range light and the invisibility of any light on plaintiff's vessel, as prescribed by said rule and said aforementioned statute, was a proximate cause contributing to, if not the sole cause of the collision between the said vessels and all the loss, damage, injury or destruction for which plaintiff seeks recovery in said cause, and that the absence of such light constituted negligence of the plaintiff [113] as a matter of law, sufficient to preclude plaintiff from any right of recovery in said cause.

(Bill of Exceptions, pages 21–23.)

IX.

The court erred in failing and refusing to give the following instruction to the jury, as requested by the defendant in writing:

"Plaintiff admits, in this case, that his vessel was not equipped with a range light. I instruct you that defendant's motor-boat, being less than forty (40) feet and more than twenty-six (26) feet, is classified, under the law, as a motor-boat of the second class. You are instructed that, under the law, every motor-boat, in all weathers from sunset to sunrise, shall carry the following lights, and during such time no other lights which may be mistaken for those prescribed shall be exhibited; every motor-boat of class 2 shall carry the following lights:

First: A bright white light in the fore part of the vessel as near the stem as practicable, so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side.

Second: A white light aft to show all around the horizon.

Third: On the starboard side, a green light so constructed as to show unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side. On the port side, a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from the right ahead to two points abaft the beam on the port side.

I further instruct you that since it is admitted by both parties that the defendant's steamer, 'The Olympic,' was an overtaking vessel, she was approaching the 'Magna' from an angle of more than two points abaft the beam, and so as to be out of view of the white light in the forepart of the 'Magna,' and the red and green colored lights, if those lights were burning and placed according to law.

Under these admitted facts and the law, which I have mentioned, the admitted failure of the 'Magna' to carry the prescribed white light aft to show all around the horizon is a fault sufficient to fix plaintiff with at least contributing fault for the collision between the vessels and the consequent loss and damage, if any, suffered by the plaintiff, requiring you to return a verdict for the defendant unless you shall find that the failure to carry such white light aft to show all around the horizon, by the 'Magna,' could not have been one of the causes of the collision."

The "Pennsylvania," 19 Wallace, 125.

Belden vs. Chase, 150 U. S. 674.

The "Martello," 153 U. S. 64.

The "Britannia," 153 U. S. 130.

X.

The court erred in failing and refusing to give the following [114] instruction to the jury, as requested by the defendant in writing:

"You are further instructed that if you should find that the plaintiff was guilty of negli-

gence as claimed by the defendant, and that such negligence might possibly have contributed to the collision, then the plaintiff cannot recover, and it will be your duty to return a verdict for the defendant, notwithstanding that you may also find that the defendant's officers or agents were also guilty of some act of negligence likewise contributing to the disaster."

XI.

The court erred in failing and refusing to give the following instruction to the jury, as requested by the defendant in writing:

"You are further instructed that the lights required by law must be carried by all vessels after sundown, and that it is no legally sufficient excuse that some other light is carried in lieu of those prescribed by law for, under the law, no other lights than those actually prescribed shall be exhibited which may be mistaken by another vessel for the prescribed lights. There can be no substitution for the requirements of the law, and you are instructed that under the law plaintiff was required to carry at the time of the collision between the two vessels involved in this case a white light aft to show all around the horizon, placed at a higher elevation than the white light showing forward, and so placed as to form a range with the forward light, and to be clear of house awnings and all other obstructions so as to be actually visible to a vessel approaching from the direction of the defendant's vessel, and the

plaintiff's admitted failure to carry and show such a light renders the plaintiff guilty of negligence, as a matter of law, sufficient to bar him from any recovery, in this case, unless the plaintiff shall prove that his admitted failure in this respect could not have been one of the causes which contributed to the collision, and in the absence of such proof it will be your duty to return a verdict for the defendant.

Act of June 9, 1910, Chap. 268, par. 1, 2, 3 and 8.

36 Stats. 462, Title 46, U. S. C. A., Secs. 511, 512, 513 and 518.

Department Circular No. 236, 12th Ed., issued by Secretary of Commerce regulating motor-boats, under date of May 1, 1928.

The 'Breakwater,' 155 U. S. 252.

The 'Delaware,' 161 U. S. 459.

The 'Luckenbach,' 50 Fed. 129.

The 'Straits of Dover,' 120 Fed. 900.

Belden vs. Chase, 150 U. S. 674."

XII.

The court erred in failing and refusing to give the following instruction to the jury, as requested by the defendant in writing:

"You are instructed that all persons navigating vessels are entitled to assume and to place reasonable reliance upon the assumption that persons navigating other vessels will obey the law as to lights required to be carried on such other vessels, and that the defendant was not guilty of negligence if those in charge of the

navigation of defendant's vessel failed to anticipate or to guard against the absence of proper lights upon the plaintiff's vessel, or to act otherwise than a reasonably careful [115] or prudent person or persons would have acted under similar circumstances.

Belden vs. Chase, 150 U. S. 674, 699, 37 L. Ed. 1218.

The Oregon vs. Rocca, 59 U. S. 18, Howard 570, 15 L. Ed. 515."

XIII.

The court erred in failing and refusing to give the following instruction to the jury, as requested by the defendant in writing:

"You are instructed that under the law, plaintiff was required to carry on board his vessel either life-preservers or life-belts, or buoyant cushions or other device sufficient to sustain him afloat and so placed as to be readily accessible Plaintiff admits that the life-preservers which were carried on board his vessel, were not so placed as to be readily *assessable,* and you are instructed that such failure on the part of plaintiff renders him guilty of contributory negligence as a matter of law, barring him from any right to recover for injury or damage alleged to have been sustained as a result of his immersion in the water, unless you shall find that plaintiff's failure in this respect was not a contributing cause to any injury or damage which plaintiff

may have suffered or sustained by reason of such immersion, if you shall find that plaintiff suffered any damage at all from such immersion, but in no event shall you allow any recovery to plaintiff for any such injury or damage unless you shall first find that plaintiff's failure to carry the after white light prescribed by law could not have been one of the causes of the collision between said vessels.

Act of June 9, 1910, Chap. 268, par. 5.
36 Stat. 463.
Act of March 4, 1913, Chap. 141, Par. 1.
37 Stat. 736.
Title 45, U. S. C. A., Sec. 515.
Belden vs. Chase, 150 U. S. 674, 699; 37 L. Ed. 1218."

XIV.

The court erred in giving the following instruction to the jury:

"As a matter of fact, the court agrees with the statement of counsel for the defense in his argument that if the plaintiff had that light in the doorway of his boat, lit long enough before the collision so that it could have been seen by a proper lookout on the 'Olympic,' they would have avoided him, and the collision would have never occurred. And if the plaintiff had it there, as he says that he did, and which the defendant denies, there is no reason why he should not recover in this action.

Before we come to any more of the law, I am simply stating that I agree with counsel's position, and I think the plaintiff does now, too. That is all I can see in this case. You must remember this, that the plaintiff must prove his case by a greater weight of the evidence. The burden is on him throughout to prove that he had that light there, lit there for the length of time that I have stated to you, and prove that it was a good and sufficient light to serve its purpose, and to prove the amount of his damages. The burden is on him to prove all those things before he can recover. So you see that in this case, there [116] is mainly involved the credibility of witnesses where there is a direct conflict between the witnesses for the plaintiff and the witnesses for the defendant."

(Bill of Exceptions, pages 57 and 58.)

XV.

The court erred in giving the following instruction to the jury:

"The plaintiff basis his right to recover in this action on the fact that the collision was due, as he alleges, to the negligence and fault of the defendant, and the defendant alone, and the defendant resists on the theory, as it alleges, that it was not negligent and at fault at all, but that the plaintiff himself is the guilty per-

son, by reason of not conforming to the rules with respect to his lights."

(Bill of Exceptions, page 60.)

XVI.

The court erred in giving the following instruction to the jury:

"The Captain was there, and his duty was to navigate the vessel and see that it was kept on its course, as he outlined it, but he is not a satisfactory lookout to come within the provisions of the law requiring a lookout to be kept, as I have defined it to you. And, again, that is the attitude of counsel for the plaintiff, when he says there is only one question in this case, and I agree with him, whether the aft light on this vessel of the fisherman was there."

(Bill of Exceptions, page 64.)

XVII.

The court erred in giving the following instruction to the jury:

"Now, you have heard the testimony of the plaintiff. He told you * * * he was in there navigating his vessel north, northwest, the same course as the defendant's vessel was going when it overtook him."

(Bill of Exceptions, pages 64 and 65.)

XVIII.

The court erred in giving the following instruction to the [117] jury:

"The plaintiff was not obliged to keep any lookout behind him, because if he had his lights lit, he was entitled to presume that any vessel following him would take note of him and would comply with the law and not run him down."

(Bill of Exceptions, pages 65 and 66.)

XIX.

The court erred in giving the following instruction to the [117] jury:

"On the other hand, there are two witnesses for the plaintiff who testified to seeing the light shortly after the collision occurred. Mrs. Schuman, now deceased, whose testimony was read to you, testified that she was eating when she felt the vibration of the reversing; that she sat still for quite a while, and hearing more commotion, she went to the window and saw a boat and saw a light on top of the vessel. She does not say whether that was a light in the cabin door, or at the bow of the vessel. She said she saw it on top of the vessel. That was her testimony, and Mr. Schuman testified that he came out some time after the collision—you remember the time—of course the intervals, perhaps, were not very long, any of them—and that after the 'Olympic' had backed so that it was in the rear of plaintiff's boat, he saw this white light burning in the cabin door."

(Bill of Exceptions, page 66.)

XX.

The court erred in giving the following instruction to the jury:

"If that was his aft light, and there is no reason why it could not have been, even though it was not across the dividing line in the middle of the ship—between the bow and the stern —if that was his aft light, and it was the only aft light that he had, if it was not so placed that it would be seen all around the horizon, It could be seen from behind, but it could not be seen from either side, because it was within the frame two inches, and, of course, it could not be seen from the front. But you must remember, too, that the law is a practical thing, and it does not require any useless thing. If that light served the purpose of an aft light to a following vessel, it was altogether immaterial whether it would show from the sides or show from ahead, so as far as that vessel is concerned, but provided it was sufficient to serve the purpose of an aft light for the following vessel, and could not at all have misled it or have contributed to the collision which happened. I myself cannot reason out, and I think counsel has taken that attitude—I cannot reason out why, if that light was there, lit, and no obstruction in plaintiff's rear, and plaintiff testifies that there was none—I cannot understand why it would not serve just as well for the following vessel as if it could be seen

from either side and ahead. If you can, why that is your privilege, for you to finally determine this. So it comes right down to that question—the attitude taken by the plaintiff's counsel in his argument, and the court takes it as a matter of law."

(Bill of Exceptions, page 67.)

XXI.

The court erred in giving the following instruction to the jury:

"You have two questions to decide in this case, outside of the damage, and you must decide them both in the affirmative before you can find for the plaintiff. First, it is proven by the greater weight of the evidence that Nelson's light in [118] his cabin door was where he testified that it was; that it was of the kind that he testified it was, and lit sufficiently long before the collision so that it could have been seen by the defendant's lookout, had he been exercising his function properly and in time so that the collision might have been avoided. If you answer that that is proven by the greater weight of the evidence, then you proceed to the next question. If you do not find that the greater weight of the evidence proves that in Nelson's favor, that ends the case. Of course, if he did not have that light lit, and lit sufficiently long so that a watchful lookout on the defendant's vessel could have seen it in time to avoid him, why he has no right to any re-

covery here, because he was negligent. In that case, he violated the law, and I do not care whether it was five o'clock or five-twenty, or whether it was more or less dark, it is inevitable that the absence of his light, if it was absent, would have contributed something to the collision that followed. He is out of the case and out of court right there, unless you find by the greater weight of the evidence that his light was there, as he tells you, with that degree of sufficiency—a 6-volt light—and lit long enough to have been seen and avoided by the defendant's vessel, had it a watchful lookout at the time.

If, however, you find that in favor of the plaintiff, then the next question is, in its position there in the door, if you find it was there and lit—not visible ahead and not visible on the sides—did it have anything to do with or is it clear to you that it contributed nothing to the collision that followed. Here is a vessel coming from behind—the defendant's vessel. If that light had been visible on the sides and ahead, would it have better enabled the defendant's vessel aft to avoid him and to see him and avoid him? I do not think so, and counsel's attitude for the plaintiff in his argument likewise was the same. That is common sense. If the light was there, and visible from the defendant's vessel, had it a watchful lookout, as counsel said fairly in his argument,

if it was there long enough, it would have enabled the defendant to avoid the collision.

So, if you answer those two questions in the affirmative, proven by the greater weight of the evidence, favorable to the plaintiff, then there is only one more question, and that is, how much was the damage?"

(Bill of Exceptions, pages 67, 68, 69.)

XXII.

The court erred in giving the following instruction to the jury:

"But if you find that he has been injured by the fault of the defendant as I have heretofore defined it to you—if you answer the two questions that I first put to you in favor of the plaintiff, then he is at least entitled to something for having his personal rights invaded by being thrown into the water."

(Bill of Exceptions, pages 69 and 70.)

XXIII.

The court erred in giving the following instruction to the jury: [119]

"That is the case before you. It simmers down to this, Lady and Gentlemen of the Jury, that taking into consideration all of the evidence in the case, both for the plaintiff and the defendant, and the circumstances, if you find by the greater weight of the evidence that the plaintiff had, as he testified to you, a light in the door of his pilot-house, facing the rear,

of 6-volt size, as he tells you, and burning long enough before the collision so that a watchful lookout on defendant's vessel could have seen it, and so could have avoided the collision, he is entitled to recover."

(Bill of Exceptions, page 70.)

XXIV.

The court erred in giving the following instruction to the jury:

"Now, the law says that where two persons testify to a situation at the same time, the one who testifies positively that it was thus and so—'I saw it'—is entitled to more weight than one who says, 'No, it was not that way.' 'I didn't see it.'

That is the point that counsel wants to make, and it is for you to say whether it applies in this case. The plaintiff says, 'I had the light there,' and the captain says, 'He did not have the light there, because I did not see it.' Of course, that involves whether he saw it or he did not see it because it was not there."

(Bill of Exceptions, pages 76 and 77.)

XXV.

The court erred in entering judgment in favor of plaintiff on each cause of action and in entering any judgment in favor of plaintiff whatsoever.

Respectfully submitted,

BRONSON, JONES & BRONSON,

Attorneys for Defendant.

Received copy of foregoing assignment of errors this 5th day of August, 1931.

WINTER S. MARTIN,
GVC.

[Endorsed]: Filed Aug. 5, 1931. [120]

[Title of Court and Cause.]

SUPERSEDEAS AND COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That said Puget Sound Navigation Company, a corporation, as principal, and Columbia Casualty Company, a corporation organized anl existing under and by virtue of the laws of the State of New York and duly authorized to transact business within the State of Washington, as surety, are held and firmly bound unto Hans Nelson, the plaintiff in the above-entitled case, in the just and full sum of Twenty-five Hundred Dollars ($2500.00), for which sum well and truly to be paid we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of August, 1931.

The condition of this obligation is such, that,

WHEREAS, lately in the term of the District Court of the United States for the Western District of Washington, Northern Division, and on,

to wit, the 11th day of May, 1931, in the suit pending in said court between the said Hans Nelson, as plaintiff, and the above-named Puget Sound Navigation Company, as defendant, a final judgment was rendered against the said Puget Sound Navigation Company, a corporation, for the sum of Twenty-five Hundred Dollars ($2500.00), together with costs, and the said defendant has served and filed, in accordance with law, a notice of appeal from such judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and has obtained a citation thereon, directed to the said Hans Nelson, citing him to be and appear before the said United States Circuit Court of Appeals for the Ninth Circuit, to be held in San Francisco, in the State of California, according to law, within forty (40) days from the date thereof. [121]

Now, if the said Puget Sound Navigation Company, a corporation, principal above named, shall prosecute its appeal to effect, and pay and satisfy all damages and costs that may be awarded against it, in the event of its failure to make good it plea upon such appeal, then this obligation to be void; otherwise to be and remain in full force and effect.

PUGET SOUND NAVIGATION COMPANY.

By BRONSON, JONES & BRONSON, (Signed).

Its Attorneys.

COLUMBIA CASUALTY COMPANY.

[Seal] By ELSIE LEDGERWOOD, (Signed)

Attorney-in-fact.

Approved.

BOURQUIN, (Signed)
Judge.

[Endorsed]: Filed Aug. 20, 1931. [122]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Kindly prepare record on appeal in the above-entitled matter to the United States Circuit Court of Appeals for the Ninth Circuit, consisting of the following, all, other than the complaint, answer and reply, pertaining to the second trial of the above-entitled court:

1. Complaint.
2. Answer.
3. Reply.
4. Verdict.
5. Judgment.
6. Defendant's motion for nonsuit and dismissal.
7. Defendant's motion for directed verdict.
8. Bill of exceptions, as amended, together with court's certificate.
9. Petition for allowance of appeal.
10. Order allowing appeal and fixing appeal and supersedeas bond.
11. Appeal and supersedeas bond.
12. Assignment of errors.
13. Citation on appeal.
14. Plaintiff's original Exhibits, 1, 2, 3, 8 and 9.

15. Defendant's Exhibits 10 and 11.
16. This praecipe.

BRONSON, JONES & BRONSON,
Attorneys for Defendant.

Received copy of foregoing praecipe for transcript of record this 20th day of August, 1931.

WINTER S. MARTIN,
By Miss CLARK.

[Endorsed]: Filed Aug. 21, 1931. [123]

[Title of Court and Cause.]

STIPULATION AND ORDER RE TRANSMISSION OF ORIGINAL EXHIBITS.

IT IS HEREBY STIPULATED by and between the parties hereto through their respective attorneys undersigned, that the following original exhibits may be forwarded with the transcript on appeal to the Clerk of the United States Circuit Court of Appeals in San Francisco, to be used as part of the record in the appeal of the above-entitled proceeding: Exhibits I, II, III, VIII, IX and XI.

Dated at Seattle, Washington, this 26th day of August, 1931.

MARTIN and COLLETT, (Signed)
Attorneys for Plaintiff.
BRONSON, JONES & BRONSON,
Attorneys for Defendant.

ORDER.

Pursuant to the above and foregoing stipulation, IT IS HEREBY ORDERED that the Clerk of the above-entitled court transmit to the Clerk of the United States Circuit Court of Appeals at San Francisco, as part of the record on appeal, the following original exhibits admitted in evidence in the trial of the above-entitled exhibits proceeding, viz.: Exhibits I, II, III, VIII, IX, X and XI.

Done in open court this 27th day of August, 1931.

JEREMIAH NETERER, (Signed)
U. S. District Judge.

[Endorsed]: Filed Aug. 27, 1931. [124]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 122, inclusive, to be a full, true and correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel,

filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of the said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant herein, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return 365 folios at 15¢	$54.75
Appeal fee (Section 5 of Act)	5.00
Certificate of Clerk to original exhibits, with seal	.50
Certificate of Clerk to Transcript of Record with seal	.50
Total	$60.75

[125]

I hereby certify that the above cost for preparing and certifying record, amounting to $60.75, has been paid to me by attorneys for the appellant.

I further certify that I herewith transmit the original citation issued in the above-entitled cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said court, at Seattle, in said District, this 24th day of August, 1931.

[Seal] ED. M. LAKIN,
Clerk of the United States District Court for the Western District of Washington.

By E. W. Pettit,
Deputy. [126]

[Title of Court and Cause.]

CITATION ON APPEAL.

The President of the United States to the Above-named Plaintiff, Hans Nelson, and to Winter S. Martin and Arthur Collett, Jr., His Attorneys, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, in the State of California, within forty days from the date of this writ, pursuant to an appeal filed in the office of the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, wherein Hans Nelson is plaintiff and the Puget Sound Navigation Company, a corporation, is defendant, to show cause, if any there be, why the judgment in such appeal mentioned should not

be corrected and speedy justice should not be done in that behalf.

[Seal] BOURQUIN,
Judge.

Copy of above citation received and due service of the same is hereby acknowledged this —— day of June, 1931.

_____,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 10, 1931. [127]

[Endorsed]: No. 6600. United States Circuit Court of Appeals for the Ninth Circuit. Puget Sound Navigation Company, a Corporation, Appellant, vs. Hans Nelson, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed September 2, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.